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# West Virginia's Adoption Statute: A History of a Work in Progress

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# WEST VIRGINIA'S ADOPTION STATUTE: THE HISTORY OF A WORK IN PROGRESS

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Lisa Kelly\*

I.	INTRODUCTION .....	2
II.	THE JOURNEY TO WEST VIRGINIA'S CURRENT ADOPTION STATUTE .....	5
	A. <i>The Pre-1997 West Virginia Adoption Statute</i> .....	5
	B. <i>The West Virginia Law Institute Steps In</i> .....	11
	1. <i>The History of the West Virginia Law Institute's Adoption Reform Project</i> .....	11
	2. <i>The West Virginia Law Institute's Proposed Reforms</i> .....	14
	a. <i>The West Virginia Law Institute's Notice and Consent Procedure</i> .....	15
	b. <i>The West Virginia Law Institute Addresses the Problem of the "Unknown Father"</i> .....	22
	c. <i>The West Virginia Law Institute Defines Presumptive Abandonment</i> .....	25
	d. <i>WVLI Opens the Door – Just a Crack – to Open Adoption</i> .....	28
	e. <i>The Institute's Attempt to Bring Clarity to Proper Adoption Expenses</i> .....	34
	C. <i>The West Virginia Law Institute Presents Its Proposed Statute to the Legislature</i> .....	36
III.	THE 1997 ADOPTION STATUTE.....	40
	A. <i>Section-by-Section Analysis Comparing the Pre-existing Statute with the WVLI Proposal and the 1997 Enactment</i> .....	40
	B. <i>Current Adoption Procedure</i> .....	48
IV.	SURELY THIS CAN'T BE RIGHT: PROBLEMS RESULTING FROM DRAFTING IN THE NOTICE AND CONSENT PROVISIONS OF WEST VIRGINIA'S 1997 ADOPTION STATUTE .....	53
	A. <i>Inconsistencies on the Critical Issue of Consent</i> .....	53
	B. <i>Redundancies in the Notice and Consent Provisions</i> .....	53
	C. <i>Elevating the Unknown Father's Rights over Those of</i>	

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\* Professor of Law, West Virginia University College of Law, and adult adoptee. I would like to thank Professor Carl Selinger who encouraged me to become involved with the West Virginia Law Institute and who mentored me through both the organization of the statewide conference on family law in 1993 and the Adoption Reform Project which was its progeny. I also am grateful for all of the wonderfully insightful education I received from the members of the Adoption Reform Advisory Committee. I offer particular gratitude to Heidi Kossuth, Institute Reporter, who, as the first reporter for this project, gathered information that ultimately assisted in the writing of this article. Finally, I appreciate the diligent work of Michele Mansfield, my research assistant.

	<i>Other Non-Marital Fathers</i> .....	56
V.	CONCLUSION .....	58

## I. INTRODUCTION

It is an autumn day in 1994, and I am sitting around the big table at the West Virginia State Bar office. The chairs are filled with adoption specialists from many disciplines, each with their own perspective of what is right and what is wrong with West Virginia's adoption statutes. We are meeting under the auspices of the West Virginia Law Institute<sup>1</sup> to determine how to reform the law so that it serves the best interests of children, while striking the proper balance between the rights and needs of birth and adoptive parents. I am one of two professors whose presumed role in the process is "family law expert." As a relative newcomer to this role,<sup>2</sup> I clothe myself in the persona of the academic. I provide information about West Virginia's current law, about what other states are doing, and about the Uniform Adoption Act, which was then under consideration by the National Conference of Commissioners on State Laws. I pose questions designed to elicit all points of view.

I do not say, "And, oh by the way, I am an adult adoptee."

I don't announce my legal status, in part, because I feel that I might jeopardize my role as neutral facilitator, and, in part, because it seems that as a child adopted at an early age by a step-parent, my experience is different from the presumed traditional adoptee experience. Under the presumably typical model, adoption is a legal process that occurs when a birth parent places her newborn infant with an agency or individual for eventual adoption by individuals unrelated and unknown to her. All contact with the biological family is severed by the adoption process under this traditional model.

As a step-parent adoptee, I fall outside of this model. I still have a biological connection through my mother, and I have extended family through whom I can learn more about my birth father who died when I was a little over a year old.

As I learn more about adoption, I discover that my experience is not the exception; that in fact, placing a healthy newborn with an unrelated adoptive parent occurs in a minority of the adoption cases.<sup>3</sup> Most adoptions involve children

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<sup>1</sup> The West Virginia Law Institute ["Institute" or "WVLI"] is a statutorily created body that serves "as an official advisory law revision and law reform agency of the state of West Virginia . . . located at the West Virginia University college of law." W. VA. CODE § 4-12-1 (1999). The Institute has no authority to enact legislation on its own. Its governing body is comprised of members of the state and federal judiciary, counsel from the state's executive branch, members of the West Virginia Legislature and its staff, members and officers of the state bar, and the dean, selected students and professors of the college of law. W. VA. CODE § 4-12-3 (1999).

<sup>2</sup> At the time of these discussions, I was beginning my third year of full-time teaching.

<sup>3</sup> In 1994, the National Conference of Commissioners on State Laws reported that "[i]n recent years, no more than 25-30% of all adoptions involve infants adopted by unrelated adults." See UNIF. ADOPTION ACT, Prefatory Note, 9 U.L.A. 13 (1999).

forming relationships with parental figures who have some legal or biological relationship with one of the child's birth parents.<sup>4</sup> Still other adoptions involve children, of various ages, who have been removed from their birth parents by the state.<sup>5</sup>

Even among infant adoptions, the traditional model is not always followed. Some birth parents help to select the adoptive homes of their children and continue to remain available to their children even after the legal adoption has been finalized.<sup>6</sup> Some infant adoptions occur through new reproductive technologies that

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There is no current public or private data base for national adoption statistics. The most recent complete picture of adoption in the United States was produced by the National Center for State Courts in Williamsburg, Virginia in a study authored by Victor and Carol Flango. Their study reviewed court records, bureau of vital statistics records and records of social service agencies. VICTOR FLANGO & CAROL FLANGO, NATIONAL CENTER FOR STATE COURTS, THE FLOW OF ADOPTION INFORMATION FROM THE STATES (1994) [hereinafter FLANGO AND FLANGO REPORT.]

According to the Flango and Flango Report, during the 1990's, approximately 120,000 children were adopted each year. In 1992, 15.5% of these adoptions involved placement by public agencies. Public agency adoptions refer to placements by public, government-operated agencies or by private agencies under contracts with government agencies. Another 37.5% of the adoptions resulted from independent or non-agency adoptions. These adoptions may involve a licensed or unlicensed facilitator, certified medical doctor, member of the clergy, or attorney. *Id.*

Another growing form of adoption involves intercountry or international placements. In 1992, there were 6,536 international adoptees brought to the United States. By 1998, that number had increased to 15,774. The largest number of these international adoptees came from Russia. National Adoption Information Clearinghouse, *Intercountry Statistics* (visited June 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/intercountry.htm>> (relying upon Immigration and Naturalization Service, Demographic Statistics Branch, Statistics Division).

<sup>4</sup> According to the West Virginia Division of Vital Statistics and the Department of Health and Human Resources, almost three-fourths of all adoptions in West Virginia in 1994 were related adoptions, i.e., adoptions wherein birth parents and adoptive parents are related by birth or marriage. Interview by Heidi Kossuth, Institute Reporter. Nationally, over half of the 130,000 or more adoptions that take place each year, more than 50% are adoptions by step-parents or relatives. See UNIF. ADOPTION ACT, Prefatory Note, 9 U.L.A. 13 (1999). According to the Flango and Flango Report, 42% of completed adoptions in 1992 were either kinship or step-parent adoptions. FLANGO AND FLANGO, *supra* note 4.

<sup>5</sup> An estimated 15-20% of all adoptions nationally involve children who are being adopted out of foster care. UNIF. ADOPTION ACT, Prefatory Note, 9 U.L.A. 13 (1999). According to the Adoption and Foster Care Analysis and Reporting System of the United States Department of Health and Human Resources 1999 projections, there are approximately 520,000 children currently in foster care in the United States, 110,000 of whom are available for adoption. In 1997, 31,000 children were adopted from foster care. National Adoption Information Clearinghouse, *Adoptions From Foster Care* (visited June 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/foster1999.htm>> (relying upon United States Health and Human Services data.)

In West Virginia, for fiscal year 1998, an estimated 187 adoptions took place out of foster care. *Adoptions Up in 1998: ASFA Plays Key Role*, Vol. 18 No. 3 A.B.A. CHILD L. PRACT. 2 (1999).

<sup>6</sup> For a book explaining the growth of the open adoption movement, its benefits to all members of the adoption triad, and the process of parenting children through open adoption, see BRUCE M. RAPPAPORT, THE OPEN ADOPTION BOOK: A GUIDE TO MAKING ADOPTION WORK FOR YOU (1992). The current legal status of open adoption is catalogued in Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive The Uniform Adoption Act?*, 30 FAM. L.Q. 483, 488-489 (1996). According to a 1991 study of open adoptions, in 69% of public and private agency adoptions, the birth parents had met the adoptive couple. MARIANNE BERRY, *Risks and Benefits of Open Adoptions*, 3(1) THE FUTURE OF CHILDREN 125-138 (1993). Another study of agency adoptions revealed the growing popularity of open adoptions. While only 35% of the agencies studied offered fully disclosed adoptions between 1987 and 1989, by 1993, the percentage had grown to 76%. RUTH G. MCROY, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS (1998).

continue to evolve even as this article goes to press such as artificial insemination,<sup>7</sup> surrogacy,<sup>8</sup> and egg donation.<sup>9</sup> Even cloning stands as a possibility in the not too distant future.<sup>10</sup>

How do we craft a law that meets the needs of all of these adoption contexts without overly complicating the proceedings or the statute itself? How do we meet the competing visions of what adoption is and should be? These would be the challenges facing the Institute and, later, the West Virginia Legislature.

<sup>7</sup> Through sperm donation, a biological mother can influence the physical characteristics, even the gender, of her child. Recent advances in reproductive technology have produced an 93% accuracy rate for those opting to have a female child and a 73% predictability rate for a male child. See Lisa Belkin, *Getting the Girl*, THE N.Y. TIMES, July 25, 1999 (Magazine) at 26; Frederic Golden, *Boy? Girl? Up to You*, TIME, Sept. 21, 1998, at 82.

<sup>8</sup> The case of *In re Baby M*, 537 A.2d 1227 (N.J. 1988), holding a surrogacy contract invalid, focused the nation's attention on surrogate motherhood. The characters from this drama continue to attract media interest. See Jim Puzzanghera, *Unhappy Surrogate L.I. Mom Wants to Live Closer to Baby M*, NEWSDAY, Dec. 13, 1997 at 19. The enforceability of surrogacy contracts continues to generate controversy among legal scholars. See e.g., MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988); Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW MED. & HEALTH CARE 72 (1988); Katharine A. Bartlett, *Re-expressing Parenthood*, 98 YALE L.J. 292 (1988); Margaret Friedlander Brinig, *A Materialistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377 (1995); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989); Golnar Modjtahedi, Note and Comment, *Nobody's Child: Enforcing Surrogacy Contracts*, 20 WHITTIER L. REV. 243 (1998).

<sup>9</sup> The ethics of the new reproductive technologies have triggered debate within the worldwide community of scholars interested in family law, inheritance, race, and medical ethics. See, e.g. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY* (1997); CARSON STRONG, *ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE: A NEW FRAMEWORK* (1997); Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125 (1998); James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technologies and the Law of Inheritance*, 47 DEPAUL L. REV. 743 (1998); Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225 (1998); Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH. U. L.Q. 759 (1998).

<sup>10</sup> Scottish scientists' successful cloning of the sheep, Dolly, in 1996, followed by Japanese biologists' claims in 1998 to have used a cloning technique to produce eight identical calves, has unleashed a furious debate about the possibilities and ethics of human cloning. In 1997, President Clinton urged a moratorium on research into the area of human cloning. Nevertheless, in 1998, American scientist, Richard Seed announced that he and several other Chicago-area scientists planned to begin work on a human cloning project which he hoped would evolve into creating yet another avenue of opportunity for infertile couples. See ALL THINGS CONSIDERED (NPR radio broadcast, Jan. 6, 1998) (interview can be found at National Public Radio, *Human Cloning Plans* (visited July 4, 1999) <[www.npr.org/news/health/980106.cloning.html](http://www.npr.org/news/health/980106.cloning.html)>. For books and articles exploring the questions raised by this new technology as applied to humans, see LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGIES* (1999); Lori B. Andrews, *Is there a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643 (1998); Judith F. Daar, *The Future of Human Cloning: Prescient Lessons from Medical Ethics Past*, 8 S. CAL. INTERDISC. L.J. 167 (1998); Michael A. Goldman, *Human Cloning: Science Fact and Fiction*, 8 S. CAL. INTERDISC. L.J. 103 (1998); Charlene Kalebic, *The Constitutional Question of Cloning Humans: Duplication or Procreation? An Examination of the Constitutional Right to Procreate*, 8 S. CAL. INTERDISC. L.J. 229 (1998); M. Cathleen Kaveny, *Cloning and Positive Liberty*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15 (1999).

During the fall 1996 interim legislative session, the Institute did propose amendments to West Virginia's adoption law.<sup>11</sup> Tactical decisions had been made to address certain issues and leave others for another day. In resolving the issues that were addressed, compromises had to be made to accommodate the competing views of the members of the Advisory Committee and the Institute.

Finally, during the 1997 legislative session, the West Virginia Legislature did pass amendments to reform the state's adoption process. It too made compromises to satisfy certain constituency groups and to resolve the different perspectives of the delegates and senators who considered and voted on the bill. In the end, some of the Institute's provisions remained in the statute, some were modified, and some fell to the legislative cutting room floor.<sup>12</sup>

More than two years have passed since the Legislature reformed West Virginia's adoption statute. The goal of this article is to provide a kind of legislative history to deepen the reader's understanding of the current statute. This history will include an explanation of the West Virginia Law Institute's Proposal, as well as the Legislature's reaction to it. In Part II, I will detail this history. In Part III, I will explain the operation of the current statute, with mention of the few recent adoption decisions that have construed various provisions. In Part IV, I will look at some of the problems caused by the hurried redraft of certain portions of the statute in the closing hours of the 1997 legislative session.

By way of coming attractions, I plan to make this the first in a trilogy of articles. The second article will be published in the *West Virginia Law Review's* Spring Symposium issue, *Family Law in the Year 2000*. In this second article, I will examine the constitutional rights of non-marital fathers in the context of the new statute in order to determine whether the current statute as enacted passes constitutional muster.<sup>13</sup> In the third article, I will look at some of the issues that both the Institute and the Legislature ducked in the most recent round of reforms. By the end of this trilogy, I hope that we will have a better understanding of the current law, as well as a road map for future reforms, both immediate and long-term.

## II. THE JOURNEY TO WEST VIRGINIA'S CURRENT ADOPTION STATUTE

### A. *The Pre-1997 West Virginia Adoption Statute*

Adoptions are governed by Article 4 of Chapter 48 of the West Virginia Code. Compared to some state statutes governing adoption, the pre-1997 adoption

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<sup>11</sup> The author has on file all preliminary, final drafts, and amendments to the West Virginia Law Institute's Proposal to Amend Chapter 48, Article 4 of the West Virginia Code.

<sup>12</sup> For a comparison of the Pre-1997 statute with the Institute's proposal and the final adoption Act enacted signed into law in 1997, see the Table at the conclusion of Part I *infra*.

<sup>13</sup> See Lisa Kelly, *Is West Virginia's Adoption Statute Constitutional in Its Treatment of Nonmarital Fathers?: Yes, No, Maybe So*, 102 W. VA. L. REV. (forthcoming Sept. 2000).

statute took a minimalist approach.<sup>14</sup> For instance, nothing in the statute regulated the actual placement of children in adoptive families. The home study, or "discreet inquiry" as it is referred to in the West Virginia statute, was to be accomplished after the filing of the adoption petition and before the final hearing.<sup>15</sup> Since, typically, the adoption petition was not filed until between twenty to thirty days prior to the final hearing,<sup>16</sup> often the home study was performed after the child had lived with the family for as long as five months.

No specific qualifications were imposed upon the person who was to perform the discreet inquiry. The statute required only that it be performed by "any suitable and discreet person not related to either the persons previously entitled to parental rights or the adoptive parents."<sup>17</sup> Whether these discreet inquiries were conducted at all was discretionary with the court, and the statute set forth no criteria to guide the exercise of that discretion.<sup>18</sup>

Under the pre-1997 Act, only the biological mother and the legal or determined father of the child were required to either give consent or have their rights terminated in order for an adoption to proceed.<sup>19</sup> Legal fathers were those who were married to the child's mother at the time of the child's birth or conception or who subsequently married the mother after the birth of their child.<sup>20</sup> The determined father was a man in whom paternity had been judicially established prior to the adoption.<sup>21</sup> Putative fathers, i.e., those biological fathers in whom paternity had never been judicially established, were not required to provide their consent to a child's adoption under the pre-1997 Act.

The procedure to be followed in executing consents or relinquishments<sup>22</sup>

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<sup>14</sup> For instance, the New York statute in place at the time comprised nearly two hundred annotated pages in the New York statutes compared to West Virginia's approximately twenty pages. See N.Y. DOM. REL. LAW §§ 109-117 (McKinney 1999); W. VA. CODE §§ 8-4-1 - 16 (1996) (amended 1997). Illinois statutes devoted at least 150 pages to adoption. See 750 ILL. COMP. STAT. ANN. 50/0.01-50/24 (West 1999). The Uniform Adoption Act contains over 115 separate provisions, UNIF. ADOPTION ACT, Table of Contents, in comparison to West Virginia's statute, which still remains lean at only twenty-one sections, even after its amendment in 1997. W. VA. CODE §§ 48-4-1 - 16 (1999).

<sup>15</sup> W. VA. CODE § 48-4-9(b) (1996) (amended 1997).

<sup>16</sup> The pre-1997 West Virginia statute did not provide for when the adoption petition should be filed. It did provide that those entitled to notice would be served within twenty to thirty days of the final hearing, depending upon the form of service, W. VA. CODE § 48-4-8 (1996) (amended 1997) and that the final hearing could not occur until the child had resided in the adoptive home for a period of six months. W. VA. CODE § 48-4-9(a) (1996) (amended 1997).

<sup>17</sup> W. VA. CODE § 48-4-9(b) (1996) (amended 1997).

<sup>18</sup> *Id.*

<sup>19</sup> W. VA. CODE § 48-4-3 (1996) (amended 1997). An adoptee over the age of twelve at the time of the adoption was also required to consent. *Id.*

<sup>20</sup> W. VA. CODE § 48-4-1 (1996) (amended 1997).

<sup>21</sup> *Id.*

<sup>22</sup> Neither "consent" nor "relinquishment" was defined by the pre-1997 statute, although both terms were used throughout. A consent refers to the birth parent's placement of a child with a particular individual for the purpose of that individual's adoption of the child. By contrast, a relinquishment refers to a birth

was also largely ungoverned by the West Virginia statute pre-1997. As long as the birth parents signed the consent or relinquishment seventy-two hours or more after the birth of the child in question, that consent was irrevocable absent fraud or duress.<sup>23</sup> Although the statute did require that certain language be included in the irrevocable consent form,<sup>24</sup> the statute was silent as to what counseling, if any, the birth parent should undergo prior to signing the consent, who could draft or execute the consent, and what procedure should be followed in obtaining the birth parent's consent.

As with most adoption statutes, if those birth parents with recognized parental rights failed or refused to give their consent, the adoption could proceed only if those parental rights were terminated.<sup>25</sup> Often, the termination hearing took place at the same time as the final adoption hearing. Again, by that time, the child would have resided with the adoptive parents for at least six months.

"Abandonment," the most frequently used basis for terminating parental rights under Chapter 48, was nowhere defined in the statute. Attorneys throughout the state complained bitterly that, in some jurisdictions, judges refused to allow adoptions in cases where children received little more than birthday cards from absent parents year after year.<sup>26</sup> The common law definition of abandonment required the court to find that the absent parent had exhibited "conduct . . . [that evinced] a settled purpose to forego all parental duties and relinquish all parental claims to the child."<sup>27</sup> With no temporal scope attached to this definition, and a lack of specificity as to the types of conduct that would evince such a settled purpose, practitioners complained that termination decisions were riddled with unpredictability.

A more general, and ambiguous category of individuals was required to receive notice of the adoption under the pre-1997 statute. Under 48-4-8, notice of

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parent's agreement to place the child with an agency that will in turn, place the child for adoption. This distinction is made clear in the definitions section of the new statute. See W. VA. CODE § 48-4-1(g), (n) (1999).

<sup>23</sup> W. VA. CODE § 48-4-5(a) (1996) (amended 1997). For cases in which a birth parent sought to revoke her consent based upon fraud or duress, see *Wooten v. Wallace*, 351 S.E.2d 72 (W. Va. 1987) (finding no duress where mother's personal circumstances, as opposed to the unconscionable act of another, induced her to sign consent to adopt); *Rich v. Rich*, 364 S.E.2d 804 (W. Va. 1987) (finding that where adoptive father later seeks to revoke birth father's consent, in order to avoid a child support obligation on the basis of his own fraud in the transaction, revocation will be denied); *Baby Boy R. v. Velas*, 386 S.E.2d 839 (W. Va. 1989) (denying revocation where mother was presented with a temporary foster care agreement the day after the child was born and the voluntary relinquishment three days later; mother claimed not to understand what she was signing and sought to revoke within a month after signing).

<sup>24</sup> W. VA. CODE § 48-4-5(a)(3) (1996) (amended 1997).

<sup>25</sup> W. VA. CODE § 48-4-3 (1996) (amended 1997).

<sup>26</sup> At the outset of the Institute's work on the Adoption Reform Project, Heidi Kossuth, the first reporter for the project, solicited practitioner input in an article in the *WEST VIRGINIA LAWYER*. The most frequent complaint dealt with the lack of specificity in the common law abandonment definition. Letters from family law practitioners in West Virginia, to Heidi Kossuth, Reporter, West Virginia Law Institute Adoption Reform Project (1994-1995) (on file with author).

<sup>27</sup> *In re Adoption of Schoffstall*, 368 S.E.2d 720, 722 (W. Va. 1988) (quoted in *In re Adoption of Mullins*, 421 S.E.2d 680, 682 (W. Va. 1992)).



the adoption proceedings was to be served upon "any known person entitled to parental rights of a child prior to its adoption who has not signed either a consent for the adoption of the child or a relinquishment of custody of such child, or whose parental rights have not otherwise been terminated."<sup>28</sup> The right to notice could be waived if proper language was used.<sup>29</sup> The ambiguity of this section was imbedded in the central language of "person entitled to parental rights."<sup>30</sup> No definition was provided to inform the practitioner of who fell into this category of persons entitled to parental rights.

The West Virginia statute did not address the ramifications of any of the new reproductive technologies on the adoption process. One brief reference to surrogacy contracts could be found in the exceptions to the prohibitions against the purchase or sale of a child,<sup>31</sup> but surrogacy contracts were not defined or regulated in the Code. Typically, a surrogacy contract involves an agreement between prospective adoptive parents and a birth mother who agrees to conceive a child with the intention of placing the child with the adoptive parents. The genetic material for the child may be in whole, in part, or not at all the product of the prospective adoptive parents.<sup>32</sup>

West Virginia's apparent approval of surrogacy contracts stood in contradiction to its consent and relinquishment provisions by prohibiting the execution of consents to adopt prior to the expiration of seventy-two hours after the birth of the child to be adopted.<sup>33</sup> The surrogacy provision also appeared ambiguous in light of another statutory section that voided all contracts which sought "to alter the time or manner of adoption as provided in this article."<sup>34</sup> If a surrogacy contract was based upon contracting for adoption prior to the seventy-two hour post-birth period for consent, could it survive as a matter of public policy?

Not only did the pre-1997 statute raise concerns about the subjects that it did not address; it also caused alarm over the way that certain other subjects were handled. Most prominent among these concerns was the lack of finality of

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<sup>28</sup> W. VA. CODE § 48-4-8(a) (1996) (amended 1997).

<sup>29</sup> The actual language, which remains in the statute today, is that the waiver must be by "a writing acknowledged as in the case of deeds or by other proper means." *Id.* This language was found offensive, particularly by the adult adoptees on the West Virginia Law Institute Advisory Committee, because it likens children in the adoption proceeding to transferable property.

<sup>30</sup> *Id.*

<sup>31</sup> W. VA. CODE § 48-4-16(e)(3) (1996) (amended 1997) provided:

(e) This section does not prohibit the payment or receipt of the following:

. . . (3) Fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.

<sup>32</sup> See Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 669-678 (1991).

<sup>33</sup> See W. VA. CODE § 48-4-5(a) (1996) (amended 1997).

<sup>34</sup> See W. VA. CODE § 48-4-15 (1996) (amended 1997).

adoptions that the West Virginia statute created. The pre-1997 statute allowed for the vacation of an adoption by any person "not served with notice as provided in said provisions . . . at any time within one year after learning of or having reasonable opportunity to learn of the adoption."<sup>35</sup> This provision, when combined with the ill-defined contours of the provision setting forth who was required to receive notice, as discussed above, left some adoptive families in perpetual limbo. In particular, the provision struck fear into the hearts of adoptive families created under circumstances in which the child's birth father could not be found.<sup>36</sup> The indeterminate period of time from which the one year was to run meant that there might never be finality in such adoptions. Not only did consideration need to be given to achieving meaningful finality, but the whole issue of how to handle adoptions when the mother contends that the father is unknown required more attention than the pre-1997 statute gave it.

Yet another matter about the existing statute caused considerable debate. The irrevocability of consents and relinquishments entered into after only seventy-two hours of the child's birth<sup>37</sup> long had seemed very harsh to many birth parent advocates. Should a new mother or father have some period of time after the signing of a consent to change her or his mind? If so, what should that time period be? West Virginia was clearly in the minority in its refusal to give birth parents any opportunity to change their minds after the seventy-two hour window.<sup>38</sup>

<sup>35</sup> W. VA. CODE § 48-4-12 (1996) (amended 1997).

<sup>36</sup> In infant adoptions, practitioners reported that it was not at all uncommon for birth fathers to be listed as unknown. Discussions with Advisory Committee members, WVLI Adoption Reform Project.

<sup>37</sup> W. VA. CODE § 48-4-5(a) (1996) (amended 1997).

<sup>38</sup> Many states prescribe a period following the execution of the consent or relinquishment during which revocation may occur without adjudication. *See, e.g.*, ARK. CODE ANN. § 9-9-209 (Michie 1998) (ten days); CAL. FAM. CODE § 8814.5(a) (Deering Supp. 1999) (ninety days); GA. CODE ANN. § 19-8-9(b) (1999) (ten days); IND. CODE ANN. § 31-19-14-3(a) (Michie 1997) (until entry of final adoption decree); IOWA CODE ANN. § 600A.4 (West 1996) (allows revocation within ninety-six hours of execution); KY. REV. STAT. ANN. § 199.500(5) (Michie 1998) (twenty days); MINN. STAT. ANN. § 259.24 6a. (West Supp. 2000) (ten working days); N.C. GEN. STAT. § 48-3-608(a) (Supp. 1998) (allows twenty-one days or seven days, depending upon the age of the child); TENN. CODE ANN. § 36-1-112 (1996) (ten days); VA. CODE ANN. § 63.1-220.2 (Michie Supp. 1999) (fifteen or twenty-five days of execution, depending upon age of child); WASH. REV. CODE ANN. § 26.33.160(2) (West 1997) (consent revocable until court approves the consent).

Other states provide a period during which a petition for revocation may be filed to be adjudicated by the court using "the best interest of the child standard," *see, e.g.*, N.H. REV. STAT. ANN. § 170-B:10. (Supp. 1998) (issue must be raised prior to the final decree); N.Y. DOM. REL. LAW § 115 (McKinney 1999) (issue must be raised within forty-five days after execution and, if objected to, decided under best interests standard); N.D. CENT. CODE § 14-15-08 (2) (1997) (issue must be raised before the final order); OHIO REV. CODE ANN. § 3107.084 (Anderson 1996) (issue must be raised prior to final decree).

Some states do a combination of both, allowing unconditional revocation for a prescribed period, but requiring adjudication of the child's interest if the time for unconditional revocation has passed, *see, e.g.*, ALASKA STAT. § 25.23.070 (Michie 1998) (consent may be withdrawn before the entry of the adoption decree, for any reason within ten days after consent is executed, or after the ten-day period, if the court finds withdrawal to be in the child's best interest); HAW. REV. STAT. § 578-2 (f) (1993) (consent cannot be withdrawn after child is placed with prospective adoptive parents, unless the court finds that it would be in the best interests of the adoptee).

States following West Virginia's position include: ARIZ. REV. STAT. ANN. § 8-106(D.) (West Supp. 1999); MONT. CODE ANN. 42-2-417 (1999); N.M. STAT. ANN. §§ 32A-5-21(A)(7) (Michie 1999); OR. REV. STAT. § 109.312 (b) (1997).

Many adoption attorneys also felt discomfort with the provisions that criminalized the purchase or sale of a child, while at the same time permitting "reasonable and customary legal, medical, hospital or other expenses incurred in connection with legal adoption proceedings."<sup>39</sup> Was it "reasonable and customary," for example, to give money to an indigent pregnant woman so that she could pay her utility bills, thereby increasing her chances of a healthy pregnancy, as she considered whether to place her unborn child for adoption? Or would such an act be felonious?<sup>40</sup> Those engaged in arranging adoptions yearned for clarity as to what was and was not permissible.

Finally, West Virginia's adoption statute was based upon the traditional model of closed adoptions. This model has been called the "as if" model of adoption,<sup>41</sup> where everything is done to create the adoptive family in the image of the ideal biological family. In the most extreme versions of this model, agencies attempt to engineer placements to match children by body-build, hair and eye color to their adoptive families.<sup>42</sup> After the adoptive family is finalized, it is *as if* the biological family never existed.

West Virginia followed this closed model of adoption. The child's birth certificate is changed to reflect that he or she was born to the adoptive family; his or her actual birth records are sealed, as are the adoption proceedings themselves;<sup>43</sup> and the birth family ceases to have any contact with, or legal obligation to, their biological child. Inheritance passes from and to the adoptive family, and the child is no longer able to benefit from his or her birth family's estate.<sup>44</sup> The presumed secrecy of the proceedings was even reflected in the terminology of a "discreet inquiry" by "any suitable and discreet person."<sup>45</sup>

Only the existence of the West Virginia Voluntary Adoption Registry<sup>46</sup> ("Registry") served the needs of adoptees and birth parents who sought to learn more about each other. The Registry provided a clearinghouse for birth parents and adult adoptees to register their willingness to release identifying information to

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<sup>39</sup> W. VA. CODE § 48-4-16(e)(2) (1996) (amended 1997).

<sup>40</sup> Under W. VA. CODE § 48-4-16(a)-(c) (1996) (amended 1997), any person guilty of knowingly offering, giving or agreeing to give, and any person guilty of knowingly receiving or accepting an offer of money, property, service or other thing of value in consideration for locating, providing or procuring a child for adoption, has committed a felony punishable by one to five years and/or fined \$100.00 to \$2,000.00.

A recent provocative film directed by Jodie Foster illuminated the class issues that surround adoption. See *THE BABY DANCE* (Showtime Network, Inc., 1998).

<sup>41</sup> ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 53-57 (1993).

<sup>42</sup> *Id.*

<sup>43</sup> W. VA. CODE § 48-4-10 (1996) (amended 1997).

<sup>44</sup> W. VA. CODE § 48-4-11 (1996) (amended 1997).

<sup>45</sup> W. VA. CODE § 48-4-9(b) (1996) (amended 1997).

<sup>46</sup> W. VA. CODE § 48-4A-1, *et seq.* (1996) (amended 1997).

each other.<sup>47</sup> However, nothing in the adoption procedure itself served to make the birth parents aware of its existence, and no appropriations were provided to maintain it. Instead, the Registry was to be supported by the user's fees charged to those who sought out its services.<sup>48</sup>

Obviously, the Registry did not open the closed adoption process. It only provided a mechanism for some adoptees and birth parents to find out about each other and, even then, only after the adoptee had reached the age of majority. There had been much debate in the adoption community about whether more steps should be taken to open up the process at least for future adoptions.<sup>49</sup>

For all of these reasons, it was time to revisit West Virginia's adoption statute.

### B. *The West Virginia Law Institute Steps In*

#### 1. The History of the West Virginia Law Institute's Adoption Reform Project

In September of 1993, the West Virginia Law Institute held a multi-disciplinary, statewide conference to identify legal issues impacting children and families in West Virginia. The purpose of the conference was first to brainstorm and then to select an area in which the Institute could make a difference by proposing statutory reform.

Several issues were identified as a result of the Institute's conference.<sup>50</sup>

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<sup>47</sup> W. VA. CODE § 48-4A-1 (1996) (amended 1997).

<sup>48</sup> W. VA. CODE § 48-4A-8(j) (1996) (amended 1997).

<sup>49</sup> Books advocating greater openness in adoption proceedings include RUTH G. MCROY ET AL., *OPENNESS IN ADOPTION: NEW PRACTICES, NEW ISSUES* (1988); LOIS RUSKAI MELINA & SHARON KAPLAN ROSZIA, *THE OPEN ADOPTION EXPERIENCE* (1993). Among the many law review articles advocating the same are Tammy M. Somogyi, Comment, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619 (Mar. 1997); Appell, *supra* note 7 at 488-489.

<sup>50</sup> During the morning of the day-long conference, held on September 17, 1993, five working groups brain-stormed about the need for reform in the following areas: child support; juvenile justice; child abuse and neglect; adoption and surrogacy; and custody and visitation. Each group reported to the whole in a plenary session.

The majority of the afternoon was spent discussing the need for restructuring the fragmented family court system in West Virginia. Jeffrey A. Kuhn of the National Council of Juvenile and Family Court Judges made a presentation of model unified court systems and facilitated discussion among the body as a whole. Notes and Conference materials on file with author and with organizer of the conference.

In addition to adoption, many other issues that surfaced during the conference have become the subject of recent legislative and constitutional amendment initiatives. Most notably, an effort was made to amend the West Virginia Constitution in order to facilitate the creation of a family court system in the fall of 1998. See Phil Kabler, *Senate Stalls Lobbyists' Effort to Get Tax-Exempt Status*, CHARLESTON GAZETTE, March 11, 1998, at 2A; *Judges May Ask State for More of Their Own*, CHARLESTON GAZETTE, June 16, 1998, at 5A. This effort to amend the constitution failed. See Maryclaire Dale, *Committee Urges Creation of Family Courts*, CHARLESTON GAZETTE, December 2, 1998, at 1C. However, some small steps toward court reorganization were taken with legislation signed by Governor Underwood in the summer of 1999. Establishing mediation as an integral part of resolving family law disputes was also a part of this recent legislative effort. Unfortunately, however, no funding was provided to train or compensate the required mediators.

However, the law pertaining to adoption was one important area affecting children and families that did not already have an identified constituency advocating for its reform. Unlike some of the other needs, for example the creation of a unified family court system, that would have required the Legislature to appropriate funds and to wrangle with the power of established political forces, adoption reform seemed to be a project that would not require additional state funds or bump up against anyone's political bailiwick.

Additionally, adoption seemed ripe for reform. The facts in the *In Re Baby Jessica*<sup>51</sup> case had riveted national attention on the tragedy that befalls children and families when adoptions go awry. The National Conference of Commissioners on Uniform State Laws had been hard at work on the Uniform Adoption Act which would be approved and recommended for enactment in all the states at its 1994 Annual Conference.<sup>52</sup> West Virginia's adoption statute had not been amended in any way for nearly a decade and there was a growing belief in the community of adoption practitioners that reform needed to happen.

On April 29, 1994, the Institute voted to accept the Adoption Reform Project.<sup>53</sup> On June 13 and August 8, 1994, the reporter for the project<sup>54</sup> and West Virginia College of Law Professor Carl Selinger, long-time Secretary of the Institute, appeared before the West Virginia Legislature's Interim Joint Subcommittee on Foster Care and Adoption. The Legislature provided the requested support for the project and an Advisory Committee was formed to review the existing statute, target problem areas, and draft amendments.<sup>55</sup>

The membership of the Institute's Advisory Committee drew upon the many disciplines and parties involved in the adoption process. Attorneys, judges, legislative staff, the Department of Health and Human Resources, private adoption agencies, counselors, adult adoptees, adoptive parents, members of the clergy, and College of Law professors active in the family law area were all represented.<sup>56</sup>

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<sup>51</sup> For an account of the travails of Baby Jessica, see Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER MAG. 56 (March 22, 1993). For the opinion that adjudicated the merits of the case, see *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992).

<sup>52</sup> For an excellent review of the process that resulted in the hotly debated Uniform Adoption Act, see Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345 (Summer 1996). The convergence of cases like Baby Jessica's with the deliberations that would produce the Uniform Adoption Act is discussed in Mark Hansen, *Fears of the Heart*, 80 A.B.A. JOURNAL 58 (Nov. 1994).

<sup>53</sup> Notes and Memoranda from WVLI Meeting, Charleston, W. Va. (April 29, 1994) (on file with author.)

<sup>54</sup> Attorney Heidi Kossuth was the first reporter for this project and facilitated all meetings of the Advisory Committee and appeared before the Legislature to secure approval of the project. Professor Lisa Kelly, this author, was the second reporter and, as such, drafted the Institute's proposed bill and presented it to the Legislature.

<sup>55</sup> Notes and Memoranda, W. Va. Legislature's Interim Joint Subcommittee on Foster Care and Adoption (June 15 and Aug. 8 1994) (on file with author).

<sup>56</sup> Members of the Advisory Committee were: David A. Barnette, adoption practitioner with the firm of Jackson & Kelly; Barbara Baxter, then president of the West Virginia Bar and representative of birth parents; Gwen Bridges of the Department of Health and Human Resources; Hon. W. Craig Broadwater, then Circuit Judge of Ohio County; Maureen Conley, attorney for the Legal Aid Society and representative for

The one perspective not directly represented in the process was that of the birth parent. The search for birth parent spokespeople, within the state of West Virginia, proved unsuccessful. One might speculate that this silence was due in part to the fact that West Virginia still labored under the stigmatizing traditional adoption system, in which birth parents were to disappear and never be heard from again after having "given up" their biological children for adoption.<sup>57</sup> In order to ensure that this central, but silenced, voice in some way would be heard, attorneys who had represented birth parents in actions challenging adoptions, joined the committee.

The Advisory Committee met several times during the fall of 1994 and the spring of 1995. The committee identified and studied several problem areas within the current law, and finally, narrowed the list of issues to be considered. In reviewing the current law, the Advisory Committee worked closely with the Uniform Adoption Act to determine how much of the substance and procedure of that Act would work well to address problems in West Virginia.<sup>58</sup>

The Institute spent the next year drafting and reworking a proposal to take to the Legislature and, in the fall of 1996, the West Virginia Law Institute presented its proposed amendments to Chapter 48, Article 4 of the West Virginia Code during the interim session.

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birth parents; Penelope Crandall, Administrative Director for Family Law Masters and adoptive parent; Robin J. Davis, then family law practitioner; Cynthia Evans, attorney with Legislative Services; Professor Lisa Kelly, adult adoptee, author of this article, final reporter for the project and current Family Law Professor at West Virginia University College of Law; Heidi Kossuth, initial reporter for the project, adoption practitioner, and adoptive parent; Professor Cynthia Mabry, then Family Law Professor at West Virginia University College of Law; John L. McClaugherty, representative on the National Conference of Commissioners on Uniform State Laws and attorney with Jackson & Kelly; Donna McCune, adoption counselor with Burlington United Methodist Child Placement Adoption Services; Bob Richardson, then attorney with the West Virginia Legal Services Plan and prospective adoptive parent; Margaret Kaye Smith, M.S., L.P.S.W., adoption counselor; Hon. O.C. Spaulding, Circuit Judge of Mason County; Homer A. Speaker, adoption practitioner and adoptive parent; Marlena Villers, adoption counselor with the West Virginia Adoption Exchange of the Children's Home Society of West Virginia and adult adoptee; Jennifer Bailey Walker, legislative staff of the West Virginia Senate Judiciary Committee; and the Rev. Richard Zelik, Roman Catholic priest and pastor of St. Anthony's Parish in Charleston, West Virginia. Notes, Formation of WVLI Advisory Committee, Adoption Reform Project (1994) (on file with author).

<sup>57</sup>

For a discussion of the effects of the traditional closed adoption, and the movement toward a more open system, in which communication between the birth and adoptive families is welcomed rather than dreaded, see Appell, *supra* note 7 at 483.

The beginnings of the institutionalized form of closed adoption in this country were the result of Victorian ideal of asexuality among girls and women. Consequently, unmarried women who became pregnant were to flee shamefully into exile to the newly established homes for unwed mothers, where they would be encouraged to place their children for adoption with more suitable families. From these roots grew a system of closed adoption, in which both the birth mother and the adoptive parents suffered from a potential stigma if word ever leaked either that the birth mother had had sex before marriage or that the adoptive mother was not somehow able to produce a child within the context of marriage. See REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945* (1993). For a discussion of societal attitudes toward unwed birth mothers from colonial America through today, see ANNE B. BRODZINSKY, *Surrendering an Infant For Adoption: The Birthmother Experience*, in *THE PSYCHOLOGY OF ADOPTION* 296-300 (David M. Brodzinsky and Marshall D. Schechter, eds. 1990).

<sup>58</sup>

Notes and Memoranda, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

## 2. The West Virginia Law Institute's Proposed Reforms

The central goals<sup>59</sup> underlying the Institute's proposed legislation were: 1) to secure the finality of adoptions through heightening the protection of birth parents' rights on the front end of the process, while establishing a definite period beyond which no adoption could be challenged; 2) to clearly define abandonment so that children could move beyond the limbo caused by absent parents; 3) to promote the use of the Voluntary Adoption Registry by making it a part of the adoption process; and 4) to develop a procedure for court approval of expenses to be paid to birth parents in order to safeguard against improper practices in the private adoption context.<sup>60</sup>

Other issues had surfaced as important during discussions with the Advisory Committee, but they did not find their way into the final product either because of concerns over the state's limited resources or because it was felt that excessive controversy might derail any reform at all. For instance, many on the Advisory Committee felt that West Virginia's practice of requiring a home study only after the child had been placed in the home was not in the best interest of the child. In addition, some on the committee believed that only those with training to perform adoption counseling should be appointed to perform those home studies. However, the consensus ultimately was that, in many counties, access to individuals with the requisite training is limited, that DHHR did not have adequate staff to perform home studies in cases that did not involve child abuse or neglect, and that such a requirement would ultimately raise the cost of adoption and deter the placement of children in middle and lower income homes.<sup>61</sup> Therefore, because of the state's limited human and financial resources, no changes were proposed to the home study or placement provisions of the current Act. This decision was made after considering the lengthy treatment given child placement in the Uniform Adoption Act.<sup>62</sup>

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<sup>59</sup> In addition to the main points which are the focus of the article, the Institute proposed changes at the micro level as well. Not all of the proposed amendments will be addressed in this article. However, the Table in this article, Part II.A *infra*, mentions a few more of the details not covered in the main body of this text.

<sup>60</sup> A copy of the drafts of the bill proposed by the Institute are on file with the author.

<sup>61</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>62</sup> A total of nineteen sections of the Uniform Adoption Act are devoted to the placement of minors for adoption. These provisions recognize that children are placed for adoption in a variety of ways: some directly by their birth parents; others by agencies and departments; and still others are placed after being held first in the hospital. The following is a Table of Contents of those sections setting forth the subjects covered:

### PART 1. Placement of Minors for Adoption

- 2-101 Who May Place Minors for Adoption
- 2-102 Direct Placement for Adoption by Parent or Guardian
- 2-103 Placement for Adoption by Agency
- 2-104 Preferences for Placement When Agency Places Minor
- 2-105 Recruitment of Adoptive Parents by Agency

Another example of an issue that the Advisory Committee shelved, despite a belief in its importance involved the need to regulate new reproductive technologies. Even though the Advisory Committee perceived a need to address this new and growing frontier in adoption, it was believed that walking into this controversial area could result in a protracted legislative debate that might stall or kill the enactment of any reform.

These cautious instincts undoubtedly were well-founded. Adoption, often portrayed as the happy portion of the family law caseload, stirs deep emotions when it comes to defining the terms of its regulation. The National Conference of Commissioners of Uniform State Laws unexpectedly discovered the highly charged reality of this situation both during and after the deliberations that produced the Uniform Adoption Act. No other subject that they had reviewed had stirred up passions like this one.<sup>63</sup> No other issue hits our culture in all of its soft spots at once. Class, race, gender, motherhood, fatherhood, the age old nature-nurture question: It was quickly discovered that all of these buttons are pushed in any discussion of adoption policy. First, the National Conference, then the West Virginia Law Institute and, finally the West Virginia Legislature wrestled with the strongly felt beliefs that surround this complicated area of the law.

a. The West Virginia Law Institute's Notice and Consent Procedure

Under the Institute's proposal, the level of protection afforded birth parents at the beginning of the adoption process was increased. Nearly all members of the

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- 2-106 Disclosure of Information on Background
  - 2-107 Interstate Placement
  - 2-108 Intercountry Placement

PART 2. Preplacement Evaluation

- 2-201 Preplacement Evaluation Required
- 2-202 Preplacement Evaluator
- 2-203 Timing and Content of Preplacement Evaluation
- 2-204 Determining Suitability to be Adoptive Parent
- 2-205 Filing and Copies of Preplacement Evaluation
- 2-206 Review of Evaluation
- 2-207 Action by Department

PART 3. Transfer of Physical Custody of Minor by Health-Care Facility for Purposes of Adoption

- 2-301 "Health-Care Facility" Defined
- 2-302 Authorization to Transfer Physical Custody
- 2-303 Reports to Department
- 2-304 Action by Department

UNIF. ADOPTION ACT, Table of Contents, 9 U.L.A. 4 (Supp. 1999).

<sup>63</sup>

The "bitter disagreements" and "divisive issues" that surfaced during the protracted debates among the National Conference of Commissioners on State Laws are described in Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 347-49 (Summer 1996).



Advisory Committee shared a strong belief that by heightening the deference accorded birth parents, three critical goals would be served. First, birth parents would be respected and protected from exploitation. Second, adoptions ultimately would be more secure against constitutional attack. Finally, the increased level of protection would justify enacting a finite period beyond which an adoption could not be challenged. To accomplish these goals of finality and protection, the Institute first looked to the critical notice and consent provisions of the statute.

Under the Institute's proposal, consents and relinquishments were to be obtained not only from birth mothers and legal or determined fathers, as required under the then existing statute, but also from "outsider fathers" and "putative fathers."<sup>64</sup> By adding two new classes of fathers for consent purposes, the Institute sought to protect the rights of virtually all birth parents and insulate the finalized adoption from attack by those who might challenge its constitutionality.

"Outsider fathers" referred to a new category of fathers recognized by the West Virginia Supreme Court of Appeals in *Roy Allen S. v. Stone*.<sup>65</sup> Under *Stone*, the court held that a father who is not the legal father of a marital child may, in certain circumstances, successfully bring a paternity action with regard to the marital child.<sup>66</sup> This decision was based on the West Virginia Constitution; therefore, the Advisory Committee thought it prudent to include this new class of fathers among those from whom consent would be required.

"Putative fathers" were defined as those whom the birth mother named as possible biological fathers, who are neither determined nor legal fathers.<sup>67</sup> These two new classes of fathers significantly broadened the pool of individuals from whom consents would be required. However, it did not necessarily include all biological fathers. For instance, it would still be possible for the actual biological father to be excluded from these categories if the birth mother does not name him as the child's father. Another example of a biological father left out of the consent requirements would be the anonymous sperm donor.

Nevertheless, the Institute's approach did involve many more biological fathers in the consent process than under the then-existing law. This cautious approach recognized that the then-existing consent provisions could form the basis of a constitutional attack by a putative father on a number of grounds. First, the putative father could argue that his fundamental parental rights were violated by not requiring his consent. Second, he could argue that by giving all biological mothers the right to consent, while according only certain classes of biological fathers the right to consent, the state violated his equal protection rights. Finally, the putative father could make an argument that he was deprived of his interest in parental

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<sup>64</sup> See PROPOSED AMENDMENTS TO CHAPTER 48, ARTICLE 4 OF THE WEST VIRGINIA CODE [hereinafter WVLI PROPOSAL] § 48-4-3(a)(3), (6) (West Virginia Law Institute, Prof. Lisa Kelly, Reporter, 1996) (on file with author).

<sup>65</sup> 474 S.E.2d 554 (W. Va. 1996).

<sup>66</sup> *Id.*

<sup>67</sup> WVLI PROPOSAL, *supra* note 65, § 48-4-1(c).

rights without due process.<sup>68</sup>

In addition to including more fathers in the consent process, the Institute also proposed that the procedure for executing consents be subject to increased regulation. Petitioners in fraud or duress cases often alleged facts concerning the suspicious circumstances surrounding the execution of the consent document. In one case, it was alleged that the consent had been executed in the mother's hospital room.<sup>69</sup> In another, the consent had been signed in the office of the lawyer who represented the adoptive parents.<sup>70</sup> Often, the underlying storyline of these narratives involved poor, illiterate, and young birth mothers being pushed into signing an indecipherable document by people far more sophisticated than she.

Even though the West Virginia Supreme Court of Appeals refused to find fraud or duress under these facts,<sup>71</sup> the Advisory Committee felt that justice required that potentially exploitive situations be avoided. Both the integrity of birth parent decisions and the security of the adoptions that flowed from them demanded it.

The Institute debated many possible resolutions to this problem, from requiring the appointment of counsel for all birth parents, to in camera hearings on all consents.<sup>72</sup> Ultimately, the Advisory Committee rejected most of these solutions as either too expensive or too patronizing to the birth parent who was already sure of her placement decision. In the end, the Institute proposal sought to have the execution of consents removed from the offices of the agencies and lawyers who would be involved in the adoption. A laundry list of possible persons before whom a consent could be taken was proposed,<sup>73</sup> and other provisions were designed to insure that every birth parent understood the available services, including the

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<sup>68</sup> These arguments will be examined further in the author's forthcoming article in the *West Virginia Law Review* Spring Symposium issue, *Family Law in the Year 2000*. See 102 W. VA. L. REV. (forthcoming Spring 2000).

<sup>69</sup> See *Baby Boy R. v. Velas*, 386 S.E.2d 839, 840 (W. Va. 1989).

<sup>70</sup> See *Wooten v. Wallace*, 351 S.E.2d 72, 73 (W. Va. 1987).

<sup>71</sup> See *Velas*, 386 S.E.2d at 843; *Wallace*, 351 S.E.2d at 75.

<sup>72</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>73</sup> The Institute Proposal provided that one of the following individuals would be present during the signing of the consent:

- 1) a judge of a court of record;
- 2) an individual whom a judge of a court of record designates to take consents or relinquishments;
- 3) an employee whom an agency designates to take consents or relinquishments, but not an employee of the agency to which the minor is relinquished;
- 4) a lawyer other than a lawyer who is representing an adoptive parent or the agency to which the minor is relinquished;
- 5) a commissioned officer on active duty in the military service of the United States, if the individual executing the consent or relinquishment is in military service; or
- 6) an officer of the foreign service or a consular officer of the United States in another country, if the individual executing the consent or relinquishment is in that country.

Voluntary Adoption Registry. Other requirements were proposed to verify that the birth parent understood the meaning and consequences of the consent or relinquishment being signed. The individual before whom the consent was signed was to certify that s/he had orally explained the contents and consequences of the consent to the birth parent and that the birth parent was provided a copy of the consent at the time of the signing.<sup>74</sup>

In one of the most hotly debated proposals drafted by the Institute, the consent provision was changed to allow the birth parent 192 hours from the time of the execution of the consent to revoke that consent.<sup>75</sup> Within the Advisory Committee, members disagreed over whether this was too short or too long a period. Some wanted to maintain the irrevocability of the consent as it was in the existing statute. Some felt that the time ought to be different in the case of infant adoption as compared to the adoption of a toddler or youngster. Concerns were raised, under the existing statute, about postpartum depression and the competency of mothers only three days away from delivery to make such permanent decisions. Those who favored a longer period argued that, if most physicians will not release postpartum women to return to work until six weeks after delivery, birth mothers should have at least that amount of time to revoke a consent to adopt the child from whose birth they were recovering. Others argued that the nine months of pregnancy was enough time to decide. Some counselors hypothesized that lengthening the period would only prolong the birth mother's inevitable grieving period.<sup>76</sup> Ultimately, the Institute decided upon the 192-hour period as a compromise.<sup>77</sup> In doing so, the Institute patterned its proposal after the Uniform Adoption Act.<sup>78</sup>

The Advisory Committee also recognized that some birth parents anguished over the effect of their consent or relinquishment should the other birth parent refuse to give his or hers. Would giving a consent ultimately disqualify the birth parent from being the custodial parent should the adoption fall through? Would the consent result in the other birth parent automatically receiving custody of the child? For some birth parents, the prospect of the other birth parent having custody of the child was a real problem. Placing a child for adoption can be the loving act of a birth parent who realizes that s/he cannot raise the child and that the other birth parent will be abusive toward the child or otherwise unable to care for the child. It seemed that these parents deserved some way out of the Catch-22 in which they found themselves.

Hence, the Institute proposed that consents and relinquishments could be negotiated with conditions that would allow for revocation if the conditions were

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<sup>74</sup> See *id.* § 48-4-3a(c), (d).

<sup>75</sup> See *id.* § 48-4-5(a)(1).

<sup>76</sup> For a discussion of the psychological effects of adoption on the birth mother, see BRODZINSKY, *supra* note 58 at 295-315.

<sup>77</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>78</sup> UNIF. ADOPTION ACT § 2-408, 9 U.L.A. 37 (Supp. 1999).

not satisfied. If a condition, for example, obtaining the consent or relinquishment of the other birth parent, was not met, then the consent or relinquishment could be revoked.<sup>79</sup> This measure seemed even more appropriate given the fact that, under the Institute's proposal, the classes of birth fathers from whom consent would be required was being expanded with unknown fathers receiving greater attention.<sup>80</sup>

The Institute also realized that one of the reasons that the public was exposed to the heart-rending scenes of Baby-Turned-Toddler Jessica being torn from her adoptive home was the delay caused by the judicial system. The challenge to Jessica's adoption was actually brought within weeks of her placement.<sup>81</sup> The Institute felt that it was important that custody of the child be adjudicated pending any disputes concerning the adoption. Consequently, the Institute proposed that a series of irrebuttable or rebuttable presumptions apply, depending upon the grounds given for the revocation of the consent. These presumptions changed with the burden of proof required in each type of revocation. For instance, in the case of a revocation within the 192-hour period, the child was to be returned immediately to the birth parent with custody prior to the execution of the consent. However, in the case of a revocation charging fraud or duress, which required clear and convincing evidence to prevail, the adoptive parents could rebut the presumption in favor of the birth parents by showing that return of the child would result in irreparable harm.<sup>82</sup> By including these provisions, the Institute hoped to soften the blow for the child who is the subject of a disrupted or dissolved adoption.<sup>83</sup>

The Institute also proposed changes to the content of the consent itself. The consent or relinquishment would have to be in plain language, rather than legalese, and in the language of the signatory if that person's first language was not

79 See WVLI PROPOSAL, *supra* note 65, § 48-4-5(a)(4).

80 See discussion *infra*.

81 See Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER MAG. 56 (March 22, 1993).

82 See WVLI PROPOSAL, *supra* note 65, § 48-4-5(c), (f).

83 The rate of disruption and dissolution in adoptions is relatively low. Disruption refers to an adoption which does not continue prior to its legalization. Dissolution, on the other hand, is used to describe an adoption that fails after finalization. See Trudy Festinger, *Adoption Disruption: Rates and Correlates*, in THE PSYCHOLOGY OF ADOPTION 201 (David M. Brodzinsky & Marshall D. Schecter eds. 1990).

If an adoption is to fail, it is more likely to do so before finalization. Disruption rates are estimated at 20%. After legalization, however, the dissolution rate drops to 2%. The rate of disruption increases with the age of the child placed. For example, only 1% of infant adoptions disrupt, despite the fact that these receive most of the press attention. For children ages twelve to eighteen, the rate of disruption is 13.5%, and for special needs children, 14.3%. Rates of disruption are also higher for children with longer stays in foster care. National Adoption Information Clearinghouse, *Disruption and Dissolution*, <http://www.calib.com/naic/adtsear/adoption/research/stats/disruption.htm>, site visited on June 6, 1999. Other correlates for higher rates of disruption include whether the adoptee had siblings or whether she or he had experienced prior placements. One study also found that older male children with siblings and multiple placements were more likely to disrupt than similarly situated girls. FESTINGER, *supra* at 209.

Also worth noting is that disruption or dissolution results primarily from the adoptive parents' decision that the placement is not working. Less than .1% of all adoptions are contested annually. NAIC, *Disruption and Dissolution*, *supra*.

English.<sup>84</sup> Information about how and where to revoke consent or relinquishment within the 192-hour period would need to be included within the document itself.<sup>85</sup> The Institute adopted the language provided by the Uniform Adoption Act in the section governing the content of the consent or relinquishment.<sup>86</sup>

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<sup>84</sup> See WVLI PROPOSAL, *supra* note 65, § 48-4-3b(a).

<sup>85</sup> See *id.* § 48-4-3b(a)(6).

<sup>86</sup> The Uniform Adoption Act, section 2-406 on the Content of Consent or Relinquishment provides, in part:

(d) A consent or relinquishment must state:

(1) An understanding that after the consent or relinquishment is signed or confirmed in substantial compliance with section 2-405, it is final and, except under a circumstance stated in section 2-408 or 2-409, may not be revoked or set aside for any reason, including the failure of an adoptive parent to permit the individual executing the consent or relinquishment to visit or communicate with the minor adoptee;

(2) an understanding that the adoption will extinguish all parental rights and obligations the individual executing the consent or relinquishment has with respect to the minor adoptee, except for arrearages of child support, and will remain valid whether or not any agreement for visitation or communication with the minor adoptee is later performed;

(3) that the individual executing the consent or relinquishment has:

(i) received a copy of the consent or relinquishment;  
(ii) received or been offered counseling services and information about adoption which explains the meaning and consequences of an adoption;

(iii) been advised, if a parent who is a minor, by a lawyer who is not representing an adoptive parent or the agency to which the minor adoptee is being relinquished, or, if an adult, has been informed of the right to have a lawyer who is not representing an adoptive parent or the agency;

(iv) been provided the information and afforded an opportunity to sign the document described in section 2-404(e) [document pertains to the future release of identifying information; this language was substituted with the Voluntary Adoption Registry language]; and

(v) been advised of the obligation to provide the information required under section 2-106 [information on the medical and social background of the child];

(4) that the individual executing the consent or relinquishment has not received or been promised any money or anything of value for the consent or relinquishment, except for payments authorized by [Article] 7;

(5) that the minor is not an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. sections 1901 *et seq.*;

(6) that the individual believes that the adoption of the minor is in the minor's best interest; and

(7) if a consent, that the individual who is consenting waives further notice, unless the adoption is contested, appealed or denied.

(e) A relinquishment may provide that the individual who is relinquishing waives notice

Resolution of the issues surrounding consent or relinquishment did not end the matter of procedural due process in adoption cases. Determining to whom, when, and how notice of the proceedings is to be given remained. As noted above, under the former West Virginia adoption statute, notice of the adoption proceedings was to be given to "any known person entitled to parental rights" in the child.<sup>87</sup> If any of these individuals had signed a consent or relinquishment waiving their right to notice or if their rights otherwise had been terminated, then no notice needed to be given to them.<sup>88</sup>

In the original notice provision presented to the West Virginia Legislature, the Institute altered the notice statute in very minor ways.<sup>89</sup> It added requirements that the notice be in plain language and more explicit with regard to the consequences of failing to reply in a timely manner.<sup>90</sup> It also set forth provisions dealing with when and how notice to the unknown father would be required.<sup>91</sup>

This first draft was inadequate because of the persistence of the lack of clarity as to who fell into the category of those "entitled to parental rights." Therefore, after one appearance before the Legislature to hear its concerns and further considerations, the Institute resubmitted altered drafts on the notice provisions.

The second draft explicitly listed those individuals entitled to notice, unless those individuals had waived their right to notice or otherwise had their rights terminated. Those entitled to notice were: 1) individuals from whom consent was required; 2) an individual whom the petitioner knew was claiming to be the father of the adoptee and whose paternity had not been established; 3) any person with rights to custody or visitation of the child by court order in effect at the time of the adoption; 4) the spouse of the petitioner if that spouse had not joined in the petition; and 5) a grandparent of a minor adoptee if the grandparent's child is a deceased parent of the child and, before death, the deceased parent's parental relationship to the minor child had not been terminated.<sup>92</sup> In addition, the court, at any time during the proceedings, could order that notice be provided to a person who had revoked consent or "a person who, on the basis of a previous relationship with the minor adoptee, a parent, an alleged parent, or the petitioner, can provide information that is relevant to the proposed adoption and that the court in its

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of any proceeding for adoption, or waives notices unless the adoption is contested, appealed or denied.

UNIF. ADOPTION ACT § 2-406, 9 U.L.A. 54 (1999) (bracketed language added).

<sup>87</sup> W. Va. Code § 48-4-8 (1996) (amended 1997).

<sup>88</sup> *See id.*

<sup>89</sup> *See WVLI PROPOSAL, supra* note 65, § 48-4-8.

<sup>90</sup> *See id.* § 48-4-8(c).

<sup>91</sup> *See id.* § 48-4-8(e).

<sup>92</sup> *See WVLI PROPOSAL, supra* note 65, § 48-4-8(a) (Alternative Draft Nov. 18, 1996) (on file with author).

discretion wants to hear."<sup>93</sup>

To the extent that the notice provisions reached beyond even those arguably entitled to parental rights, the new notice provisions reflected the concerns voiced by members of the Interim Joint Committee on the Judiciary, before whom the author appeared. Several members of the committee voiced strong concerns that biological grandparents be included in the adoption process. Some even inquired as to why grandparents should not be required to consent before an adoption could proceed. The drafted language including certain grandparents and others with visitation or custody rights was offered by way of compromise to those who felt that a biological grandparent's wishes should be taken into account.<sup>94</sup>

Objections were heard within the Advisory Committee that these changes to the notice and consent procedures would lengthen the paperwork and overburden the process. However, in the end, the Institute believed that the increased burden would be offset by the benefit of insuring that all birth parents fully understand the ramifications of their decisions, and that no person with a legal claim to the child was excluded. In addition, it was believed that these increased efforts to protect all birth parents justified providing a closed-ended period beyond which individuals could not challenge an adoption decree.

b. The West Virginia Law Institute Addresses the Problem of the "Unknown Father"

One of the most difficult problems in adoption is the existence of the so-called "unknown father." Certainly, there are occasions where the actual identity of the father is completely unknown, as would be the case for a woman who conceived a child with a person she did not know, was the victim of a stranger rape, or for a child who is the product of an anonymous sperm donor. In other circumstances, it may be that the mother is uncertain of the identity of the father because of multiple partners. In still other cases, it might be that the identity of the father is known, but his location is not. Finally, it may be that the birth mother knows who and where the father is, but for her own reasons, she chooses not to disclose this information.

The reasons a woman would chose not to disclose the father undoubtedly are as numerous as the women who find themselves in this difficult position. Members of the Advisory Committee involved in adoption counseling offered several reasons why a birth mother might choose not to reveal the identity of a father. Some of these reasons may be abuse, incest, fear of embarrassment to the birth father, fear of being pressured to keep a child she feels unable to raise or to

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<sup>93</sup> See *id.* § 48-4-8(b).

<sup>94</sup> For articles detailing and analyzing the ebb and flow of the grandparent's rights movement, see Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393 (1985); Karen Czapanskiy, *Grandparents, Parents, and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994). For articles in search of the proper role of grandparents in adoption proceedings, see Kristen Jones Indermark, Note, *Permissive Intervention: Grandparents' Key to Entering Adoption Proceedings*, 26 GA. L. REV. 787 (1992); Judy E. Nathan, Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984).

remain in a relationship with the father, or, finally, simple anger directed toward the birth father.<sup>95</sup>

The issue of how far to push the mother to disclose the identity of an unknown father cuts to the core of society's beliefs about the relative power and responsibility of women versus men when it comes to decisions involving the future of newborn children. Do, or should, women have a superior right to decide what will happen with the child they alone carry in their bodies for nine months? Does mother know best? Or do birth fathers, by virtue of the donation of their genetic material and the fact that the law would hold them accountable for child support, have equal rights to determine their offsprings' futures?<sup>96</sup>

In the end, the Institute's proposal was patterned after the Uniform Adoption Act. section 3-404 of the Uniform Adoption Act requires an investigation by the court into the identity of the unknown father. The model Act does not provide for how this "inquiry of appropriate persons" is to be conducted or how the required information is to be provided to the court.<sup>97</sup> However, it does list the information, at a minimum, that the court should have at its disposal after the inquiry is complete.<sup>98</sup>

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<sup>95</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>96</sup> The case of *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998) recently addressed this question in an opinion which recognized the torts of fraudulent concealment of information and interference with parental rights. The impact of this case will be more thoroughly examined in this author's article forthcoming in the *West Virginia Law Review's* Spring Symposium Issue, *Family Law in the Year 2000*. See 102 W. VA. L. REV. (forthcoming Spring 2000).

<sup>97</sup> The Uniform Adoption Act simply requires:

If, at any time in a proceeding for adoption or for termination of a relationship of parent and child under [Part] 5, the court finds that an unknown father of a minor adoptee may not have received notice, the court shall determine whether he can be identified. The determination must be based on evidence that includes inquiry of appropriate persons in an effort to identify an unknown father for purpose of providing notice.

UNIF. ADOPTION ACT § 3-404(a), 9 U.L.A. 79 (1999).

<sup>98</sup> Subsection 3-404 (b) details the information that must be gathered:

(b) The inquiry required by subsection (a) must include whether:

- (1) the woman who gave birth to the minor adoptee was married at the probable time of conception of the minor, or at a later time;
- (2) the woman was cohabiting with a man at the probable time of conception of the minor;
- (3) the woman has received payments or promises of support, other than from a governmental agency, with respect to the minor or because of her pregnancy;
- (4) the woman has named any individual as the father on the birth certificate of the minor or in connection with applying for or receiving public assistance; and
- (5) any individual has formally or informally acknowledged or claimed paternity of the minor in a jurisdiction in which the woman resided during or since her pregnancy, or in



The Institute proposal adopted the basic format of the Uniform Adoption Act, but required that the information be provided via an affidavit signed by the birth mother. This affidavit would be attached to the adoption petition.<sup>99</sup> The Institute proposal lifted all of the areas of inquiry required by the model Act and added a few more of its own, including whether the birth mother had identified any man as the father to any hospital personnel and whether she had told any man that he is the father of the adoptee.<sup>100</sup>

Under the Institute's draft, the birth mother's affidavit would also include provisions designed to inform her of the consequences of failing to identify or misidentifying the biological father or to otherwise address some of the concerns that might underlie a birth mother's desire not to name the birth father. For example, the proposed affidavit was to state that the birth mother had been informed: 1) that her failure to provide accurate information could result in delays or disruptions in the adoption; 2) that the provision of the information will be used only for adoption purposes; 3) that the affidavit will be sealed once the adoption is complete; and 4) that she has been informed of the availability of protection against domestic violence.<sup>101</sup>

By taking these steps, together with allowing conditional revocations of consents, the Institute hoped to encourage birth mothers to identify fathers without the lurking fear that, by doing so, they will expose themselves, the birth fathers or their children, to abuse or ridicule. The concern was voiced within the committee that the coercive nature of the affidavit would result in fewer women placing their children for adoption if it meant disclosing the father. For some within the committee, those who viewed adoption as presenting loss to the birth parent and/or child, this result was a perfectly acceptable one. For others, it was seen as a threat to the availability of children who should be placed for adoption.<sup>102</sup>

Finally, the Institute proposed that, after the court's review of the information provided by the affidavit, the court should determine whether the taking of any additional evidence is necessary. If the court felt the need for additional evidence, it must order its production for the court's review at least sixty days prior to the final hearing.<sup>103</sup> If the father is identified, he should be provided notice.<sup>104</sup> If the father is unable to be identified, then the court should determine whether notice by publication is likely to lead to receipt of notice by the father. If

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which the minor has resided or resides, at the time of the inquiry.

UNIF. ADOPTION ACT § 3-404(b), 9 U.L.A. 80 (1999).

<sup>99</sup> See WVLI PROPOSAL, *supra* note 65, § 48-4-7(b).

<sup>100</sup> See *id.* § 48-4-7(b)(5)-(6).

<sup>101</sup> See *id.* § 48-4-7(b)(8)-(10).

<sup>102</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>103</sup> See WVLI PROPOSAL, *supra* note 65, § 48-4-8b(a) (Alternative Draft Nov. 18, 1996) (on file with author).

<sup>104</sup> See *id.* § 48-4-8b(b).

so, then publication is to be ordered. If the father is unable to be identified, and the court believes that publication would not be likely to lead to receipt of notice by the father, then the court may dispense with publication.<sup>105</sup>

c. The West Virginia Law Institute Defines Presumptive Abandonment

If a birth parent who is required to provide consent does not do so, then that person's parental rights must be terminated if the adoption is to proceed. Abandonment is the most frequent ground relied upon in terminating parental rights under the general adoption statute.<sup>106</sup>

As noted in Part I.A above,<sup>107</sup> West Virginia's common law definition of abandonment required that the petitioner prove, by clear and convincing evidence, that the parent whose rights were sought to be terminated had evinced a clear and settled purpose to forego all duties and relinquish all parental claims to the child.<sup>108</sup> It was also clear from the case law that a failure to financially support the child alone was insufficient to prove abandonment.<sup>109</sup> The non-custodial parent could also find refuge in the defense that his attempts to contact his child had been thwarted by the custodial parent.<sup>110</sup> The abandonment standard set a high bar for the petitioner.

The Advisory Committee believed that the common law parameters were adequate to define abandonment generally, but that a definition of conduct presumptively constituting abandonment would enhance predictability of decisions. The committee also believed that it was critical to provide the courts with guidance as to how far back in time they were to look in deciding whether a parent had abandoned his or her child.

The Advisory Committee looked to other state statutes, such as those of

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<sup>105</sup> See *id.* § 48-4-8b(c).

<sup>106</sup> In West Virginia, parental rights may also be terminated in the context of child abuse and neglect proceedings. In that case, the proceedings are typically initiated by the state and are governed by Chapter 49, Article 6 of the West Virginia Code. An adoption may follow as part of the permanency planning for the child.

Generally, the Uniform Adoption Act provides that parental rights may be terminated for failure to support/communicate with the child (i.e., abandonment), for conviction of a crime of violence indicating that the respondent is unfit, because the respondent is neither the marital nor genetic father of the child, or for any reason provided under the state's statute for involuntary termination of parental rights. UNIF. ADOPTION ACT § 3-504(c), 9 U.L.A. 86 (1999).

<sup>107</sup> See *supra* Part I.A.

<sup>108</sup> See *In re Adoption of Mullins*, 421 S.E.2d 680 (W. Va. 1992) (non-marital father found not to have abandoned his daughter, even though he had neither visited nor supported his child for four years prior to the maternal grandparents' filing petition for adoption); *In re Adoption of Schofstall*, 368 S.E.2d 720 (W. Va. 1988) (marital father found not to have abandoned son where mother and step-father thwarted visits even though no child support was paid for three years prior to the petition for adoption); *Change of Name of Harris*, 236 S.E.2d 426 (W. Va. 1977) (abandonment defined in the context of a name change petition).

<sup>109</sup> See *Mullins*, 421 S.E.2d at 682 (W. Va. 1992) (quoting *Schofstall*, 368 S.E.2d at 722).

<sup>110</sup> See *Mullins*, 421 S.E.2d at 682; *Schofstall*, 368 S.E.2d at 722-23.

New York<sup>111</sup> and Illinois,<sup>112</sup> as well as the Uniform Adoption Act, to formulate its section on conduct presumptively constituting abandonment. Both New York's statute and the Uniform Adoption Act treated parents of children younger than six months differently from parents of children older than six months. Both allowed for abandonment of newborns to be found under similar circumstances.

For children six months of age or older, the Uniform Adoption Act and New York's adoption statutes had similar, but not identical, provisions. The Uniform Adoption Act terminated the parental relationship if, for a period of six months prior to the filing of the adoption petition, the parent had: 1) failed to financially support the child within his or her means; 2) failed to visit or communicate regularly with the child; and 3) demonstrated that, at the time of the termination, he or she is able and willing to assume legal and physical custody of the minor.<sup>113</sup> New York maintained a similar financial support requirement, but more specifically required monthly visits or contact with the child during the six-month period. New York was also more explicit about the fact that the abandonment provisions applied to non-marital fathers.<sup>114</sup>

The Advisory Committee struggled with whether the six month temporal scope that seemed to be the norm was appropriate. From an adult's point of view, six months seemed a short time indeed. However, from a child's point of view, six months without any attention from a parent, may well seem like an eternity.<sup>115</sup> Ultimately, the Advisory Committee settled on the six month period believing that a biological parent should not be allowed to ignore the existence and needs of a child for over six months and then rest upon his or her fundamental rights to undermine an adoption by a prospective parent who stands ready to meet that child's needs on a daily basis.<sup>116</sup>

The next question was whether the committee should recommend that abandonment ever be found when the child involved was younger than six months old. Although the Uniform Adoption Act did not use the term "abandonment," it

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<sup>111</sup> See N.Y. DOM. REL. LAW § 111 (McKinney 1999).

<sup>112</sup> See 750 ILL. COMP. STAT. 50/8 (West 1999).

<sup>113</sup> See UNIF. ADOPTION ACT § 3-504(c)(2), 9 U.L.A. 86 (1999).

<sup>114</sup> See N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 1999).

<sup>115</sup> The ground-breaking work that first focused attention upon utilizing a child's concepts of time in custody decisions, JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* (1973), would argue that little weight should be given to the fact of biological parenthood if no attachment was formed between that biological parent and his or her child. Attachment is formed by fulfilling the immediate emotional and physical needs of the child. This child-centered philosophy has been further developed in recent legal scholarship. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1752 (1993) (finding in the wonderful Dr. Seuss fable "Horton Hears a Who" a theory for "making the authority of parenthood contingent on service to children"); Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999) (arguing that custody determinations ought to recognize and reward those who have been the child's caregiver as well as those who have supported the caregiver).

<sup>116</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

did hold that the parental rights of a child less than six months old could be terminated if the parent had failed, without compelling reason: 1) to pay, within his<sup>117</sup> means, reasonable medical expenses associated with pregnancy and birth of the child; 2) to financially support the child within his means; 3) to visit the child regularly; and 4) to show a willingness to be the custodial parent if the child was not in the other parent's custody.<sup>118</sup> New York had similar financial and medical support provisions<sup>119</sup> and added the requirement that, in order to be entitled to withhold consent, the out-of-wedlock father must have lived with the child's mother for six months prior to the adoptive placement, while holding the child out as his own.<sup>120</sup> Further, if the putative father had signed a notarized instrument after the child's conception, in which he denounced paternity of the child, his consent need not be sought in order for the adoption to proceed.<sup>121</sup>

The Institute blended provisions from the New York statute, the Uniform Adoption Act, and West Virginia's own case law, to craft its definition of presumptive abandonment. For children six months or older, the court was to look at whether, during the last six months preceding the filing of the adoption petition, the parent continuously had: 1) failed to financially support the child within his or her means; and 2) had failed to visit the child when physically and financially able to do so and was not prevented from doing so by the child's custodian.<sup>122</sup>

For children younger than six months, the Institute proposed that abandonment could be presumed when the birth father: 1) denounces the child's paternity after conception; 2) fails to provide medical support for the pregnancy and birth of the child commensurate with his means; 3) fails to financially support the infant within his means; and 4) fails to visit the child.<sup>123</sup>

The Institute's draft was careful to make clear that the conduct described was presumptive only and that it could be rebutted by a showing that the non-custodial parent's attempts to visit or communicate were thwarted by the custodial

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I use the pronoun "his" here even though the Model Act's language refers to the gender-neutral term "respondent." I do so because it is plain, not only from the substance of the suggested statutory language, but also from the comment section that this section is directed to fathers:

Under subsection (c)(1) [the section governing termination of parental rights for a child less than six months old], a respondent *father's* rights may be terminated on the basis of *his* behavior prior to the minor adoptee's birth, including a failure to manifest an ability or willingness to assume parental duties, unless *he* can prove a "compelling reason" for *his* failure.

UNIF. ADOPTION ACT § 3-504 (comment), 9 U.L.A. 87 (1999) (emphasis added and explanation provided in brackets).

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See UNIF. ADOPTION ACT § 3-504(c)(1), 9 U.L.A. 86 (1999).

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See N.Y. DOM. REL. LAW § 111(1)(e)(iii) (McKinney 1999).

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See *id.* § 111(1)(e)(i)-(ii).

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See *id.* § 111(2)(e).

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See WVLI PROPOSAL, *supra* note 65, § 48-4-3c(a).

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See *id.* § 48-4-3c(b).

parent.<sup>124</sup> Furthermore, the respondent was always permitted the opportunity to “demonstrate to the court compelling circumstances preventing such parent from supporting or visiting the child.”<sup>125</sup>

The Advisory Committee was aware that, in other states with similar standards, “compelling circumstances” became the subject of intense litigation, particularly when the birth parent was incarcerated.<sup>126</sup> While the committee was comfortable with vesting the courts with the discretion to construe the meaning of “compelling circumstances” on a case-by-case basis, there was one circumstance that all members of the Advisory Committee believed should not ever be construed as compelling. The Advisory Committee added a proviso directing “that in no event shall incarceration provide such a compelling circumstance if the crime resulting in such incarceration was one involving a rape in which the child was conceived.”<sup>127</sup>

Finally, by retaining the common law abandonment definition in the “Definitions” section,<sup>128</sup> the Institute also sought to drive home the point that the conduct listed in its “Presumptive Abandonment” provisions did not provide the exclusive avenue to a finding of abandonment; rather, it was intended as a description only of one set of conduct that should always be considered abandonment, unless properly defended against. The possibility remained for other theories of abandonment to be considered by the court, without the benefit of the presumption.

#### d. WVLI Opens the Door — Just a Crack — to Open Adoption

Controversy ignites when the issue of open adoption is placed on the table around which any diverse group of adoption practitioners and participants sits. It is first important to take a deep breath, figure out what we mean by “open adoption,” and parse out the sub-issues that flow from this topic.

Although open adoption may generate any number of questions to be addressed by the law, the central concept of open adoption is the rejection of the typical adoption paradigm, upon which most statutes are based; a paradigm grounded in “exclusivity, secrecy, and transposition, through which the adoptee . . . is taken from one family and given to another, with all vestiges of the first family removed.”<sup>129</sup>

Open adoptions may take any number of forms, but typically, they involve

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<sup>124</sup> See *id.* § 48-4-3c.

<sup>125</sup> See *id.* § 48-4-3c(c).

<sup>126</sup> Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>127</sup> WVLI PROPOSAL *supra* note 65, § 48-4-3c(c).

<sup>128</sup> See *id.* § 48-4-1(o).

<sup>129</sup> Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 997 (1995).

the birth parent(s)' participation in the child's placement, an ongoing relationship at some level between the adoptive and birth parents, which may exist both before and after the adoption, and some agreed upon level of interaction between the birth parent(s) and child.<sup>130</sup> The amount of contact between the parties to the adoption may be minimal or substantial; it may be in person or in writing; it may merely involve providing the birth parents with photographs and updates on the child's life or it may involve regular visitation.<sup>131</sup>

Adoption theorists refer to three different types or degrees of open adoption: 1) confidential, in which minimal information is shared indirectly between adoptive and birth family members before the adoptive placement; 2) mediated, in which non-identifying information is shared between the parties through an adoption agency that serves as a go-between; or 3) fully disclosed adoptions, in which identifying information is shared directly between the adoptive and birth families.<sup>132</sup>

The controversy surrounding open adoption arises from the collision of the beliefs underlying the exclusive model and the open adoption model. Parties from both camps argue that their model of adoption is in the best interests of adopted children. Those opposing open adoption argue that the exclusivity of the adoptive parent-child relationship is critical to avoid confusion and conflicting loyalties for the child. Opponents are also concerned about disruption in the bonding process that might occur.<sup>133</sup> Finally, some opponents also question the wisdom of giving so much power to birth parents. These opponents fear both the birth parents' lack of judgment to pick their children's parents, as well as their interference as the child grows.<sup>134</sup>

Proponents counter that open adoption frees all parties from the stigmatizing effects of adoption; that, in particular, it frees the child from fantasizing, for good or ill, about her or his birth parents and allows the child the best access to information about his or her biological heritage. Having answers to questions can also prove helpful to adoptive parents as they go about the business

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<sup>130</sup> For an explanation of the typical steps in an open adoption, see RAPPAPORT, *supra* note 7, at 9-12. For a good documentary account portraying open adoptions as they played out in the lives of actual adoptive families, see *48 Hours: Family Secret* (CBS television broadcast, Apr. 15, 1992).

<sup>131</sup> For the varying degrees of openness possible in open adoptions, see RAPPAPORT, *supra* note 7, at 3, 173-76.

<sup>132</sup> See National Adoption Information Clearinghouse (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/open.htm>>.

<sup>133</sup> For a discussion of the arguments behind the positions of open adoption opponents, see Appell, *supra* note 7 at 490.

<sup>134</sup> See RAPPAPORT, *supra* note 7, at 74-75 (discussing the frequently asked question, "But can they choose the right people to be the parents of their child?"). The research also suggests that, despite the frequently expressed concern that birth parents might interfere or harass adoptive parents, a significant majority of adoptive parents (72%) were very satisfied with the contact they were having with the birth mothers. See National Adoption Information Clearinghouse (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/open.htm>>.

of dealing with a child's daily health and emotional problems.<sup>135</sup> Finally, for birth parents, open adoption not only gives them greater control over the selection of their child's adoptive family, it also provides them with peace of mind as to the child's safety and ongoing development.<sup>136</sup>

The law of supply and demand has also impacted the growth of open adoptions. While the number of individuals seeking to adopt has remained relatively steady over the years, the number of healthy infants has dropped<sup>137</sup> due to the availability of abortion<sup>138</sup> and the growing social acceptability of single parenthood.<sup>139</sup> In addition, while the availability of healthy infants available for adoption has decreased, the number of children awaiting adoption out of foster care has risen. These children are usually older and already know their biological parents.<sup>140</sup> Open adoption serves the needs of both situations.

For those seeking to adopt healthy infants, open adoption shortens the wait from several years to less than one.<sup>141</sup> The reason for this decrease in waiting time

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See Berry, *supra* note 7 at 131.

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However, research does show that having a fully disclosed adoption is no guarantee that the birth parent will be able to successfully resolve her grief over the placement of her child. Birth mothers seem to suffer a grieving process no matter which form of adoption is used. See H.D. GROTEVANT & R.G. MCROY, *OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS* (1998). In fact, one study showed that birth mothers in open adoptions were significantly more troubled than those in closed adoptions in the areas of social isolation, sleep complaints, physical symptoms, despair and dependency. See Berry, *supra* note 7, at 131.

137

Statistics show the following decline in adoption placements for pre-marital births:

From 1952-1972, 8.7% of all premarital births were placed for adoption.

From 1973-1981, this percentage fell to 4.1%.

From 1982-1988, it dropped even further to 2%.

See National Adoption Information Clearinghouse, *Placing Children for Adoption* (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/placing.htm>> (data based upon Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 *THE FUTURE OF CHILDREN* 26-42 (1993)).

138

The initial drop in adoption placement rates for white women correlated with the increase in abortion rates after the legalization of abortion in 1973. See National Adoption Information Clearinghouse, *Placing Children for Adoption* <<http://www.calib.com/naic/adptsear/adoption/research/stats/placing.htm>> (data based upon C.A. Bachrach, K.S. Stolley & K.A. London, *Relinquishment of Premarital Births: Evidence from the National Survey Data*, 24 *FAM. PLAN. PERSP.* 27-32, 48 (1992)).

However, there has been no research showing that the continuing decline in adoption placements is due to a currently rising abortion rate. In fact, abortion rates have continued to decline since 1990. See National Adoption Information Clearinghouse, *Placing Children for Adoption* (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/placing.htm>> (data based upon M. Freundlich, *Supply and Demand: The Forces Shaping the Future of Infant Adoption*, 2 *ADOPTION Q.* 13-42 (1998)).

139

The continuing decline of infant adoption placements in the 1980s through today is likely the result of greater social acceptability of unwed pregnancies. See National Adoption Information Clearinghouse, *Placing Children for Adoption* (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/placing.htm>> (data based upon C.A. Bachrach, K.S. Stolley & K.A. London, *Relinquishment of Premarital Births: Evidence from the National Survey Data*, 24 *FAM. PLAN. PERSP.* 27-32, 48 (1992)).

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See Appell, *supra* note 130 at 1008-1013.

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See RAPPAPORT, *supra* note 7, at 3-4.

is that many birth parents are willing to consider allowing their children to be adopted only if they can participate in the placement of the child and perhaps have contact after adoption.<sup>142</sup>

For those children in need of permanent homes out of foster care, open adoption may make sense as well. First, these children likely already know their birth parents and may wish to continue having contact with them. Further, birth parents with children in foster care are more likely to voluntarily terminate their rights to their children so that they may be adopted if the parents know that they will continue to be able to have some contact with them. In some cases, children remain in foster care longer than they should, thereby reducing their chances for a permanent home, because their birth parents are unable to care for them and yet unwilling to let go.<sup>143</sup> The legal process to terminate parental rights involuntarily also takes time. Time is the enemy of the foster child in search of an adoptive home.<sup>144</sup> Open adoption can speed up those cases in which the termination of parental rights is underway and where some ongoing contact between the child and birth parent is in the child's interest.<sup>145</sup>

Unless the law explicitly prohibits open adoption agreements, parties to an adoption are, of course, free to make agreements to continue contact after the child's adoption is finalized. However, when the terms of these agreements are brought before the court for enforcement, if the statute is silent, courts must decide whether they are enforceable. Prior to the 1997 revisions, West Virginia's adoption

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<sup>142</sup> One study found that four times as many women facing a crisis pregnancy would be willing to consider adoption if an open adoption program were available to them, as opposed to only traditional adoption alternatives. See RAPPAPORT, *supra* note 7, at 39-40.

<sup>143</sup> See generally Appell, *supra*, note 130.

<sup>144</sup> With the exception of the youngest infants, adoption rates decline as the age of children in foster care rises:

44% of those children adopted out of foster care were between 1-5 years old.  
37% were 6-10 years old.  
15% were 11-15 years old.  
2% were 16-18 years old.  
2% were less than one year old.

The fact that the adoption rate is so low for the youngest infants likely reflects the slowness of the child abuse and neglect system, rather than the fact that these children are not adoptable. After parental rights are terminated, most children who are eventually adopted out of foster care waited 6-11 months for adoption. See National Adoption Information Clearinghouse, *Adoption from Foster Care* (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/foster1999.htm>>.

<sup>145</sup> Contrary to popular belief, not all parents who become embroiled in the child abuse and neglect system are cruel child abusers. The largest percentage of children involved in the system are there because of neglect rather than abuse. See Diana J. English, *The Extent and Consequences of Child Maltreatment*, 8 THE FUTURE OF CHILDREN 39, 44-45 (1998). This neglect may arise from any number of factors, some within and others beyond the control of the parent. For example, some children suffer neglect due to their parents' retardation or other disability. These parents and children often demonstrate deep affection for one another, even if the parent is unable to provide the care that the child needs. For a discussion of the parental rights of mentally retarded individuals, see Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415 (1995).



statute did not address this question. However, arguments against their enforcement certainly could be found in the provisions addressing the effect of adoption<sup>146</sup> and the invalidity of contracts that violated the statutes' provisions.<sup>147</sup>

Other issues raised by the open adoption paradigm involve the treatment of adoption proceedings and records. The same policies which support an open adoption proceeding would argue against sealing adoption records and proceedings.<sup>148</sup> A second and more charged question is whether adoption records generated under a previously sealed system should be opened.<sup>149</sup>

Finally, open adoption may change the way the law views some of the ancillary consequences of adoption. Some of these issues involve how intestate succession is impacted by adoption and whether visitation rights should be extended to other members of the child's extended biological family, such as grandparents or siblings.<sup>150</sup>

146

W. VA. CODE § 48-4-11(a) (1996) (amended 1997) provides:

Upon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child . . . and shall be divested of all obligations in respect to the said adopted child.

This provision remained unchanged after the 1997 legislative session.

147

W. VA. CODE § 48-4-15 (1996) (amended 1997) provides:

Any contract, agreement or stipulation which . . . endeavors to alter the time or manner of adoption as provided in this article, is contrary to the public policy of the State and such portion of any contract, agreement or stipulation is null and void and of no effect.

This section of the statute was not changed during the 1997 legislative session.

148

For a sociological analysis of the open versus sealed records debate, see KATARINA WEGAR, *ADOPTION, IDENTITY AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS* (1997).

149

Often the question of whether to open sealed adoption records is brought forward by adoptees who are searching for information about their birth parents or the circumstances of their adoption. A 1980s survey projected that 500,000 adult adoptees were seeking or had found their birth parents. An even more recent study of adopted adolescents found that 72% wanted to know why they were adopted, 65% wanted to meet their birth parents, and 94% wanted to know which birth parent they looked like. The percentage of all adoptees wanting to obtain identifying information regarding their biological parents varies according to the studies performed – between 60% and 90% – but is by all counts high. See National Adoption Information Clearinghouse, *Searching for Birth Relatives* (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/search.htm>>.

Books chronicling the importance of this search include BETTY JEAN LIFTON, *JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS* (1994); NANCY NEWTON VERRIER, *THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD* (1993).

Occasionally, searches are also initiated by birth parents. See *In re Adoption of Baby S.*, 705 A.2d 822 (N.J. Super. Ct. Ch. Div. 1997).

Typically, these search cases pit the values of confidentiality and privacy of the birth parents against those of the adoptee's personal identity or health. A recent case also considered the privacy interests of the adoption agency involved versus the adoptee's right to know about the circumstances surrounding the taking of her birth parents' relinquishments. See *In re Margaret Susan P.*, 733 A.2d 38 (Vt. 1999).

150

For discussion of the value of sibling and/or grandparent visitation in the adoption context, see

Within the Advisory Committee, a diversity of opinion existed as to which adoption model best suited the competing interests and needs of the parties. Adult adoptees felt strongly that the closed model arguably served everyone's needs and protected everybody's rights, except those of the adopted child who, was treated more like a piece of property to be transferred than a human being with a right to know the most basic facts about who she or he is. Others on the committee felt that open adoption should be an option, but not the only method by which adoptions should take place. Still others felt that by allowing even voluntary open adoptions, we would begin the slippery slide that would end in the opening of previously sealed records, an end which would result in breaking serious promises made to birth and adoptive parents who relied upon those covenants.<sup>151</sup>

It was clear that this Advisory Committee was not in a position to recommend a complete shift from the traditional adoption model that had predominated the West Virginia statute for years. However, ultimately the reporter took a position of compromise that opened the door, just a crack, to the open adoption model. In recognition of the growing popularity of open adoptions, the expectations of the parties who enter into them, and the needs of adopted children, one provision was inserted into the Institute's proposal, which allowed for the enforcement of post-adoption visitation agreements, if the court finds those agreements to be in the best interest of the child.<sup>152</sup>

Given the location and the context of this provision, it could hardly be read as the strongest endorsement of open adoption. The provision was drafted into the section dealing with the finality of the adoption decree. The subsection began with the pronouncement that no adoption decree could "be challenged for failure to

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Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 LAW & PSYCHOL. REV. 137 (1992); Christine D. Markel, *A Quest for Sibling Visitation: Daniel Weber's Story*, 18 WHITTIER L. REV. 863 (1997); William Wesley Patton & Dr. Sara Latz, *Severing Hansel From Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745 (1994); Tammy M. Somogyi, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619 (1997).

Either by case law or statute, some states recognize sibling and grandparent rights to visitation post-adoption decree. See, e.g., *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981); *In re Adoption of Anthony*, 448 N.Y.S.2d 377 (Fam. Ct. 1982); *Thrift v. Baldwin*, 473 S.E.2d 715 (Va. Ct. App. 1996); FLA. STAT. ch. 39.469 (5) (1998).

For articles concerning the impact of adoption generally on inheritance, see Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711 (1984); *The Adopted Child's Inheritance from Intestate Natural Parents*, 55 IOWA L. REV. 739 (1970).

<sup>151</sup> See Notes, WVLI Advisory Committee meetings, Adoption Reform Project (1994-1995) (on file with author).

<sup>152</sup> The Institute's proposal provided:

(d) The validity of a decree of adoption issued under this chapter may not be challenged for failure to comply with an agreement for visitation or communication with an adoptee, but the court may hear a petition for said agreement. When considering such petitions to enforce, the court shall determine whether the enforcement of such agreement would serve the best interests of the child, and may, where the court feels it appropriate, consider the wishes of a child of the age and maturity to express those wishes to the court.

WVLI PROPOSAL, *supra* note 65 § 48-4-12(d).

comply with an agreement for visitation or communication with an adoptee.”<sup>153</sup> However, the language which followed set up the right to appear before the court for enforcement. In addition to using the “best interests” standard to resolve these controversies, the Institute’s proposal also allowed for the court to “consider the wishes of a child of the age and maturity to express those wishes to the court.”<sup>154</sup>

By taking this moderate approach, the Institute sought to balance the expectations of the parties against the interests of the adopted child. Even though a birth parent could argue that the adoption would not have existed but for her or his reliance upon a promise of visitation or communication, invalidating a finalized adoption because of a failure to honor that promise would place the promise above the child’s need for family continuity. Also, to strictly enforce a visitation or communication promise, without consideration of the child’s interests or desires would be to elevate contract principles over traditional family law principles, which hold that visitation should be determined or modified based upon the child’s best interests. Such an approach would again treat the child as a commodity in the adoption “transaction,” rather than an individual with needs to be met.

In addition to allowing for the enforcement of visitation or communication agreements if found to be in the child’s best interests, the Advisory Committee also thought that it was important to promote the existence of the Voluntary Adoption Registry throughout the adoption statute.<sup>155</sup> The Institute’s proposal was peppered with references to the availability of this service. By informing parties to an adoption of the existence of this service, the Advisory Committee hoped to assist those individuals, in a limited way, in their search efforts should they choose to learn more about each other when the adoptee reached adulthood.

Even if a consensus could have been reached to shift West Virginia’s adoption statute toward a system of open adoptions with open records, concerns about the controversy generated by such a drastic shift in policy likely would have led the Institute to reject a complete overhaul in the direction of open adoptions. Throughout the Institute discussions, a high value was placed upon accomplishing necessary improvements, without stalling any reform in a hailstorm of controversy. Hence, allowing the enforcement of visitation or communication agreements under circumstances that met the child’s best interest seemed an appropriate compromise that signaled the need to recognize the growing prominence of open adoptions, while still allowing for closed adoptions to continue.

e. The Institute’s Attempt to Bring Clarity to Proper Adoption Expenses

Adoption practitioners struggled to find the proper balance between providing for pregnant birth mothers, while steering clear of the criminal

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> The article governing the existence and operation of the Voluntary Adoption Registry can be found at W. VA. CODE § 48-4A-1 to -8 (1999).

prohibition against offering or giving them something of value in consideration for consenting to the child's adoption by another. Although providing for pregnant birth mothers in need could be considered an allowable expense incurred in connection with legal adoption proceedings, it could also be construed as felonious baby buying. Such ambiguities also put birth mothers in danger of being charged with baby selling, an identically punishable felony.<sup>156</sup> Finally, the lack of an accounting requirement under the statute allowed for improper amounts of cash or goods to change hands under the arguable guise of properly incurred adoption expenses. Expenditures by unscrupulous adoption practitioners allowed a climate of adoption placements in which the baby went to the couple or individual willing to be the most generous to the birth parents.

As a side note, no study or research was performed to determine the true extent of this problem. Rather, the need to address this problem seemed to come from a general feeling of concern by some adoption lawyers that they not unwittingly open themselves up to criminal liability. Whether and how often birth parents actually engage in or encourage this imagined bidding process for their offspring is a matter of considerable dispute. Many would argue that this issue is largely the figment of the negative stereotypes society carries around in its imagination about birth parents.<sup>157</sup>

Nevertheless, in dealing with this issue, the Advisory Committee considered listing, with more specificity, the types of expenses that should or should not be allowed in adoption placements and proceedings. However, the committee quickly concluded that there could be no one exhaustive list of proper expenses because every potential birth parent had his or her own unique set of circumstances and needs. Consequently, the Institute's proposal took two steps toward providing some measure of clarity, while at the same time preserving judicial discretion.

First, the Institute's proposal required that an affidavit of fees or expenses, paid or promised by the adoptive parents, should be submitted to the court at the final hearing.<sup>158</sup> By simply requiring an accounting, the Institute hoped to inject

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See W. VA. CODE § 48-4-16 (1996) (amended 1997).

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For a discussion of the negative stereotypes that society uses to characterize birth parents, see RAPPAPORT, *supra* note 7, at 66-67, 71-72.

What is the real demographic associated with birth parents who place their children for adoption? Different studies portray different results. A California study found that birth mothers who independently placed their children were between the ages of seventeen and thirty and had no more than a high school education. A broader-based study, however, found that women who place their children for adoption often come from intact families in which their mothers had at least one year or more of college. These women have greater educational and vocational goals for themselves than those who keep their children when faced with an unplanned pregnancy. See National Adoption Information Clearinghouse, *Placing Children for Adoption* (visited Jun. 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/placing.htm>>.

It is possible that the ideas that West Virginia practitioners have about birth parents as being poor and with few options are an accurate depiction of the West Virginia birth parent population, given the high rates of poverty in West Virginia generally. For instance, 33% of children in West Virginia are poor. West Virginia ranks 48<sup>th</sup> in the nation for child poverty levels. See Children's Defense Fund, *1998 West Virginia Profile* (visited Dec. 13, 1999) <[http://www.childrensdefense.org/states/data\\_wv.htm](http://www.childrensdefense.org/states/data_wv.htm)>.

158

See WVLI PROPOSAL, *supra* note 65 § 48-4-16.

some recognition among those engaged in adoption placements that they needed to consider the propriety of all expenses because the court would consider the propriety of each expense.

Second, the Institute proposed that payments of all pregnancy and living expenses of a birth mother should be itemized and pre-approved by the court prior to their being spent.<sup>159</sup> This provision admittedly was more problematic than the accounting provision. On the one hand, it tied the hands of those who justifiably needed to make an emergency expenditure to the birth mother, such as to pay for emergency medical treatment to preserve the pregnancy. On the other, the fact that it directed this intense scrutiny only to expenses paid to birth mothers seemed to overlook the possibility that birth fathers, particularly those from whom consent was required, could just as easily use their power to extort funds improperly from adoptive parents.

However, the Institute felt that some check needed to be placed upon improper spending and that some security needed to be provided to those parties who acted innocently to assist birth parents through the pregnancy and birth of their children. These small changes sought to bring a greater degree of integrity and certainty to the adoption and placement processes.

C. *The West Virginia Law Institute Presents its Proposed Statute to the Legislature*

On September 28, 1996, the full Council of the West Virginia Law Institute voted to propose the adoption reform legislation generated by the meetings of the Advisory Committee.<sup>160</sup> On October 14, 1996, I traveled with Professor Carl Selinger, then West Virginia Law Institute secretary, to present the proposed legislation to the Joint Interim Subcommittee on the Judiciary.<sup>161</sup>

I knew from previous correspondence with legislative staff members that the Institute was likely to be questioned about the proposed eight-day revocation period.<sup>162</sup> This reform reflected a big change in the way practice of adoption law, and, from the point of view of those who represented adoptive parents, the change was seen as ill-advised or threatening.<sup>163</sup>

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<sup>159</sup> See *id.*

<sup>160</sup> See Memorandum from Professor Carl Selinger, Secretary to Members of the West Virginia Law Institute's Adoption Law Reform Project (Sept. 17, 1996) (on file with the author).

<sup>161</sup> See Lisa Kelly's Itemized Statement of Time Spent as Reporter on the West Virginia Law Institute's Adoption Reform Project (Oct. 17, 1996) (on file with the author). For press accounts of this appearance, see *Birth Parents Would Have Six Months to Challenge Adoptions Under Law*, THE DOMINION POST, Oct. 15, 1996, at 8B; *Panel Looks at Adoption Law*, CHARLESTON GAZETTE, Oct. 15, 1996, at 8D.

<sup>162</sup> See Letter from M.E. "Mike" Mowery, General Counsel to the House of Delegates, to Heidi Kossuth, then Reporter for the WVLI Adoption Law Reform Project (Aug. 4, 1995) (on file with the author).

<sup>163</sup> See Letter from David Allen Barnette, adoption lawyer, to Lisa Kelly (Sept. 23, 1996) (on file with author) (arguing against the revocation period "as a time period which increases cost, delays bonding, puts adoptive parents at risk and will trouble birth mothers who do not like their children to end up in foster care.").

Indeed, I was asked about the source and underlying rationale behind the recommendation that all those signing consents should have eight days to change their minds. Some individuals on the committee thought the change unnecessary. Others wondered if the eight day period was too short and inquired whether the proper amount of time ought to be at least fourteen days. I was also asked to bring back to the Legislature information on what other states allow. The subcommittee struggled, as did the Institute's Advisory Committee, with this issue and sought to resolve its disagreement by finding a benchmark in the practices of other states.

In response to this request for more information, I later wrote a letter that summarized how revocation periods were handled by other states.<sup>164</sup> In this letter, I pointed out that only nine other states treated properly executed consents as irrevocable.<sup>165</sup> The remaining states allowed for some revocation period, some as long as ninety days or even twelve months.<sup>166</sup>

During this initial presentation to the Legislature, the rationale was explained repeatedly that, by affording birth parents additional protections on the front end of the process, two critical goals would be accomplished□ 1) birth parents would receive the protection that both the West Virginia and federal constitutions afford them; and 2) the absolute finality of adoptions would be justified and secured. While it did appear that there was interest in achieving the latter goal of finality, particularly in light of the complete lack of it in the then existing statute, the first goal of protecting birth parents' interests sparked less enthusiasm among many members of the subcommittee.

While the question of birth parent protection did not seem to preoccupy some of the more vocal members of the subcommittee, what was of interest was bringing birth grandparents into the notice, or even consent, provisions of the statute. One or two members felt very strongly that West Virginia is a state with a long tradition of recognizing the value of an extended family and that, in honoring those values, birth grandparents ought to be able to veto an adoption or at least be notified about it and allowed to intervene.

Quite frankly, birth grandparents' rights was an issue that caught this reporter somewhat flat-footed. After attempting to explain that birth parents had fundamental constitutional rights with regard to their children,<sup>167</sup> rights which had not yet been extended to grandparents,<sup>168</sup> I promised to ponder further the question

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<sup>164</sup> See Letter from Lisa Kelly to Delegate Barbara Fleischauer and Senator Edwin Bowman, Co-Chairs of the Joint Interim Subcommittee on the Judiciary (Dec. 5, 1996) (on file with the author).

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *Rozas v. Rozas*, 342 S.E.2d 201 (W. Va. 1986) (recognizing the constitutionally protected interests one has in his or her "natural children").

<sup>168</sup> The West Virginia Supreme Court had recognized the right of visitation for a grandparent whose grandchild is the child of the grandparent's deceased child, even in the case of a step-parent adoption. See *In Re Petition of Nearhoof*, 359 S.E.2d 587 (W. Va. 1987). A statutory scheme giving grandparents who did not have access to their grandchildren through their children the right to petition for visitation was later enacted. See W. VA. CODE § 48-2B-1 to -12 (1999). This scheme recently has been broadened to allow any grandparent to petition for visitation of his or her grandchild, although the burden upon the petitioner

of what role, if any, birth grandparents should have in the adoption process.

At the Institute's second appearance before the interim subcommittee on November 18, 1996,<sup>169</sup> a redraft of the notice provisions was offered to the Legislature. This notice provision did allow for grandparents to be notified under limited circumstances. Birth grandparents would be entitled to notice if they were related to the grandchild through a deceased child of their own who had not executed a consent to the adoption or otherwise had his rights terminated prior to his or her death. In addition, the grandparent who had an established custody or visitation order would also be entitled to notice, as would any other individual with adjudicated custody or visitation interests.<sup>170</sup> This alternative language satisfied the committee's desire to honor the important role of grandparents, while not allowing them the power to trump the biological parent's constitutionally protected right to make decisions affecting their children. The subcommittee seemed content with this compromise.

During these two appearances, the rationale behind all of the proposed changes was presented. The presentation was not as detailed as that offered in this article, but the written proposal was accompanied by a comment section that sought to summarize the rationale for the proposed reforms. In terms of legislative interest, the most dialogue was generated by the issues of the revocation period, the treatment of grandparents, and the agreed upon need for finality in adoptions. Members of the sub-committee were also interested in keeping the cost of adoption as low as possible and inquired as to the expense of a typical adoption.

In my second appearance before the Legislature, I informed the subcommittee that the cost of adoption varied, depending upon whether the adoption was a private agency adoption, a public agency adoption (i.e. one sponsored by the Department of the Health and Human Services), or an independent adoption.<sup>171</sup> Step-parent or other inter-familial adoptions would also not be as expensive as other types of adoptions, in which home studies were most often required.<sup>172</sup>

It was difficult to discover how much individuals charged for independent

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becomes heavier when the grandparent's own child has access to the grandchild at issue. *See id.*

<sup>169</sup> For press accounts of this second appearance, as well as other legislative business conducted that day, see *Advisory Panel: State Inevitably Responsible for Cable Negotiations*, THE DOMINION POST, Nov. 19, 1996, at 8A.

<sup>170</sup> See WVLI PROPOSAL, *supra* note 65 § 48-4-8. For a more detailed discussion of this provision, see *supra* Part I.B.2.a.

<sup>171</sup> Average national price ranges for the various types of adoptions are as follows:

Domestic public agency adoptions: Zero to \$2,500.00  
 Domestic private agency adoptions: \$4,000.00 to \$30,000.00 +  
 Domestic independent adoptions: \$8,000.00 to \$30,000.00 +  
 Intercountry private agency or independent adoptions: \$7,000.00 to \$25,000.00

National Adoption Information Clearinghouse, *Adoption Research and Statistics: Cost of Adopting* (visited June 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/cost.htm>>.

<sup>172</sup> Nationally, home studies run anywhere from \$700.00 to \$2,500.00. National Adoption Information Clearinghouse, *Adoption Research and Statistics: Cost of Adopting* (visited June 17, 1999) <<http://www.calib.com/naic/adptsear/adoption/research/stats/cost.htm>>.

adoptions in West Virginia. However, private agency fees were ascertainable. My contact with the various agencies operating in the state revealed that one agency charged a fee of \$9,675.00, excluding medical and legal fees; another reported a cost of \$20,500.00 per adoption; and still another used a sliding fee scale in which fees for the adoption of healthy white infants were based upon 15% of the family's total income, while the fees for the adoption of a "special needs"<sup>173</sup> child was 5% of the family's total income.<sup>174</sup>

One offshoot of this inquiry and concern for the cost of adoption was the introduction of a proposal to allow a \$2,000.00 tax credit for the adoption of a child not related to the taxpayer.<sup>175</sup> This proposal was introduced by a member of the Legislature on his own initiative and finally passed.<sup>176</sup>

At the close of the interims, no specific action had been taken on the legislation. But on December 13, 1996, the Institute forwarded its amended proposal to the Speaker of the House, Robert S. Kiss, and the President of the West Virginia Senate, Earl Ray Tomblin.<sup>177</sup> The bill was reintroduced into both houses during the 1997 regular session. The grandparents' rights issue again surfaced and became the focus of the debate.<sup>178</sup> The bill was voted out of the senate Judiciary Committee in mid-March, but disagreements continued between the two houses. The bill was sent to a conference committee of both houses.

Finally, on April 11, 1997, the conference committee, spearheaded by Delegate Larry Rowe, resolved the differences between the senate and the house versions and recommended a compromise bill to both houses.<sup>179</sup> The bill recommended by the conference committee's report passed and was enacted on the last day of the regular legislative session.<sup>180</sup>

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<sup>173</sup> One of the facts that startled me about adoption practice, generally, is that biracial children and other children of color are characterized as "special needs," together with children who have handicapping conditions or who have been part of the foster care system. The implications of this categorization are provocative.

<sup>174</sup> See Statement of Lisa Kelly before the West Virginia Legislature (Nov. 18, 1996) (on file with the author).

<sup>175</sup> For press accounts of this aspect of the adoption legislation, see Phil Kabler, *Measure Authorizes Funds to Support Legislative Conference*, CHARLESTON GAZETTE, Mar. 12, 1997, at 6A.

<sup>176</sup> See W. VA. CODE § 11-21-10a (1999).

<sup>177</sup> See Letter from Carl Selinger, Secretary of the West Virginia Law Institute, to Bob Kiss, Speaker of the House, and Earl Ray Tomblin, President of the Senate (Dec. 13, 1996) (on file with the author).

<sup>178</sup> For press reports of the ongoing debate on grandparents' rights in the adoption context, see Phil Kabler, *Measure Authorizes Funds to Support Legislative Conference*, CHARLESTON GAZETTE, March 12, 1997, at 6A.

<sup>179</sup> See SB No. 61, CC #1 4/9, filed in the Clerk's Office of the House of Delegates on April 11, 1997 (on file with the author).

<sup>180</sup> See *Winners and Losers*, THE DOMINION POST, April 14, 1997, at 8B; *Ought There Be a Law?...*, CHARLESTON GAZETTE, April 28, 1997, at 1C. For a more thorough discussion of the effect of the Act in the press, see Jennifer Bundy, *State Hoping New Adoption Laws Speed Up Final Process*, PARKERSBURG NEWS, Aug. 31, 1997, at 1A.



## III. THE 1997 ADOPTION STATUTE

Most of the changes made to West Virginia's adoption statute during the 1997 amendment had their genesis in the West Virginia Law Institute's proposal. However, not all of the Institute's proposed changes were adopted. As a general matter, the Legislature acted consistently with the tenor of the interim subcommittee hearings in that: 1) adoption finality was achieved; 2) grandparents became involved in the adoption process under certain circumstances; 3) the Institute's expanded revocation period was rejected, as were some of the other provisions which would have broadened the protection of birth parents; and 4) care was taken to guard against increasing the expenses of the adoption.

*A. Section-by-Section Analysis Comparing the Pre-existing Statute with the WVLI Proposal and the 1997 Enactment*

The following table compares the pre-existing law, the Institute proposal and the law as finally enacted in 1997:

**COMPARISON OF  
PRE-1997 ADOPTION STATUTE, WVLI PROPOSAL  
AND 1997 ENACTMENT**

<b>Section</b>	<b>Pre-1997 Statute</b>	<b>WVLI Proposal</b>	<b>1997 Enactment</b>
<b>48-4-1 Definitions.</b>	Defines legal father, determined father, unknown father, birth mother, birth father, and adoptive parents.	Adds definitions of putative father, outsider father, birth parents, marital child, non-marital child, step-parent adoption, relinquishment, consent, abandonment, and agency. Amends definition of unknown father. Elaborates on different classes of determined fathers.	Adopts the WVLI changes
<b>48-4-2 Who may adopt.</b>	Allows adoption by married individuals with spouse's joinder or consent; or by unmarried individuals.	Not changed	Not changed
<b>48-4-3 Persons whose consent or relinquishment is required; exceptions.</b>	Requires consent of the mother and legal or determined father, and of the child if over twelve years old; specifies how to handle consent if both parents are deceased or if a parent is under a disability.	Adds the requirement that consent be received from outsider fathers and putative fathers; specifically addresses that consent not necessary if rights are terminated; requires joint petition in step-parent adoptions.	Adds all categories of individuals proposed by the WVLI except putative fathers; adopts all other WVLI language.

<p><b>48-4-3a Timing and execution of consent or relinquishment.</b></p>	<p>No section 3a under old statute; however, the provision stating that no consent shall be taken except after the expiration of seventy-two hours from the birth of a child was included in 48-4-5.</p>	<p>Retains seventy-two hour provision. Adds requirement: that consents be taken before described judicial officers or neutral lawyers or agencies not involved in the adoption; Requires those individuals to certify that the affiant's understanding of the consent; that birth parents be told of available services, including the Voluntary Adoption Registry.</p>	<p>Adopts the WVLI proposal in part. Requires consents be taken before judges and quasi-judicial officers listed in WVLI proposal. Rejects language that would have allowed neutral lawyers or agencies to take the consents. Rejects certification by those officers regarding parent's understanding. Rejects requirement that birth parents be advised of services.</p>
<p><b>48-4-3b Content of consent or relinquishment.</b></p>	<p>No section 3b under old statute but 48-4-5 did require that the consent include a statement that the affiant believes the adoption to be in the child's best interest and that s/he relinquishes all rights and claims to the child; that s/he is aware of the consent's irrevocability; that s/he is acting voluntarily; and that s/he waives notice of further proceedings.</p>	<p>Adds plain language requirement. Requires the listing, inter alia, of: the date of birth of the adoptee; contact information for the agency or attorney for the adoptive parent; specific instructions on how to revoke; a statement as to the finality of the consent unless properly revoked; the effect of the adoption; that the affiant has received a copy of the consent, information about the Voluntary Adoption Registry, the duty to provide information required for filing of the petition; waiver of notice unless the adoption is contested appealed or denied. Allows conditional revocation of consent.</p>	<p>Adopts the WVLI proposal, and adds a subsection requiring that the consent contain language authorizing the adoptive parent(s) or agency to consent to medical treatment for the child while the adoption proceeding is pending.</p>

48-4-3e Conduct presumptively constituting abandonment.	Did not exist	Establishes six-month temporal scope prior to filing of petition to be examined for unthwarted failure to visit and support; for infants less than six months, looks to pre-birth conduct; establishes affirmative defense of compelling circumstances.	Adopts WVLI language; Adds provision presuming unknown father abandons his child when he fails to make reasonable efforts to discover that a pregnancy and birth have occurred as a result of his sexual intercourse with the birth mother
48-4-4 Consent or relinquishment by infants.	Requires that when birth parent is under eighteen, consent shall be reviewed by the court and a guardian ad litem (g.a.l.) may be appointed to conduct a discreet inquiry from a list of individuals to determine whether fraud or duress found, but failing to appoint a g.a.l. is not grounds for setting aside a decree	No real change other than to replace the laundry list of individuals from whom the g.a.l. may inquire with the language "any person having knowledge."	WVLI change adopted
48-4-5 Revocation of consent or relinquishment for adoption.	Allowed revocation at any time for fraud or duress; Allowed revocation within ten days if consent was executed prior to the seventy-two hour period; Allowed revocation within twenty days for conditions stated in the consent.	Allowed for revocation: Automatically within 192 hours of execution; Upon agreement of the parties; For fraud or duress if proven by clear and convincing evidence; if condition allowed for in consent is proven by a preponderance of the evidence; or if the consent does not conform to requirements. Provides for method of custody adjudication while revocation is pending. Establishes a thirty day appeal deadline.	Rejects 192 hour automatic revocation period. Raises burden of proof to clear and convincing for allegations that the consent did not comply with the requirements of the statute. Rejects presumptions in resolving custody pending dispute and instead requires the court to set a hearing within thirty days to award temporary custody based upon child's best interests.

<p><b>48-4-6 Delivery of child for adoption; filing of petition.</b></p>	<p>Requires that adoptive parents be provided with information concerning the child at the time the child is delivered to them; allows petition to be filed any time after the child is placed, with or without all required consent; requires final hearing after the child has been with the adoptive family for six months.</p>	<p>Adds that among the information to be provided the adoptive parents is the affidavit of the birth mother in the event of an unknown father; adds that petition may be filed any time after all possible consents have been obtained and hearing may be had any time after the 6 months has expired and proper notice has been given and the receipt of all consents or all rights terminated.</p>	<p>Accepts all WVLI proposals and adds a forty-five day waiting period after notice before final hearing can be had.</p>
<p><b>48-4-7 Petition and appendix.</b></p>	<p>Requires that the petition contain information about the child's parentage, property, medical and social information; sets forth special considerations for when the petitioner is less than fifteen years older than the child; requires sealing file.</p>	<p>Adds the requirement that the birth mother complete a specific affidavit in the case of an unknown father; Requires that grounds for termination of rights be included in petition; exempts step-parent adoptions from the fifteen-year rule</p>	<p>Accepts WVLI language. Adds that the unknown father affidavit is to be executed before the same person as the consent and that it will be sealed once the adoption is complete.</p>
<p><b>48-4-8 Who shall receive notice.</b></p>	<p>Requires notice to any known person entitled to parental rights who has not signed a consent or had his/her rights terminated; Provides for method of service of notice; gives twenty days to respond to those who are personally served and thirty days to those served by publication or upon their personal representative in the case of an incompetent.</p>	<p>Requires notice on: those who must consent; those whom the petitioner knows have claimed paternity, even if no paternity action, unless abandonment is found; individuals with legal or physical custody or the court-ordered right to visitation; the grandparent of an adoptee if the grandparent's child is deceased and s/he had not signed a consent before death; court may add parties to receive notice as the case evolves.</p>	<p>Accepts WVLI language except men whom the petitioner knows have claimed paternity need not receive notice unless paternity has been established legally.</p>

<b>48-4-8a How notice is to be served.</b>	Sets up a hierarchy of preferences with regard to notice and states that the notice shall inform the person that his or her parental rights may be terminated; gives a twenty day response time.	Adds reference to WVRCP; requires plain language; adds that birth mother's name not to be publicized unless ordered by the court.	Adopts WVLI language.
<b>48-4-8b Notice to an unknown father.</b>	Not dealt with in previous statute.	Requires the court to: inspect the affidavit required by 48-4-7; consider any additional evidence and determine whether its possible to serve the unknown father with notice. If father not identified, court decides whether publication would be beneficial.	Adopts WVLI language.
<b>48-4-9 Proceedings.</b>	Requires final hearing to be held no sooner than six months after child has resided with the adoptive family. Sets forth required findings for final hearing. Creates "discreet inquiry" requirement, unless waived. Allows the appointment of a g.a.l. for the child. Establishes the best interest standard for adoption; Requires the adoption order to sever relationship with birth family and create relationship with adoptive family. Prohibits disclosure of birth parent names in adoption order.	No changes proposed	Added that "discreet inquiry" report may include "other information deemed necessary by the court, which may include a criminal background investigation."

48-4-10 Recordation of order; fees; disposition of records; names of adopting parents and persons previously entitled to parental rights not to be disclosed; disclosure of identifying and non-identifying information; certificate for state registrar of vital statistics; birth certificate.	Prohibits the disclosure of the names of the parties to the adoption, except through the Voluntary Adoption Registry, or unless an order for good cause is obtained.	No change	No change
48-4-11 Effect of order as to relations of parents and child and as to rights of inheritance; intestacy of adopted child.	See title	No change	No change

<p><b>48-4-12 Finality of order; challenges to order of adoption.</b></p>	<p>Allows for vacation of the adoption by any person not served with notice as provided in said provisions at any time within one year after that person learns of or had reasonable opportunity to learn of the adoption. Allows adult adoptee to vacate adoption.</p>	<p>Provided that the validity of a decree may not be challenged for any reason if more than six months has passed from the date of the decree; During the six months, challenger alleging failure to receive notice bears clear and convincing burden of proof and the best interest standard applies. Prohibits challenges based upon the failure to comply with a visitation agreement but allowed the agreement to be the subject of an enforcement action governed by the best interests of the child standard. Prohibits a challenge by one who waived notice or who was properly served with notice. Requires expeditious processing of appeals. Continues to allow adult adoptee to vacate the adoption.</p>	<p>WVLI language adopted.</p>
<p><b>48-4-13 Adoption of adults.</b></p>	<p>Adults may be adopted with their consent with the same effect; name may also be changed.</p>	<p>No change.</p>	<p>No change.</p>
<p><b>48-4-14 Jurisdiction of courts.</b></p>	<p>Concurrent jurisdiction in circuit and juvenile courts.</p>	<p>No change.</p>	<p>No change.</p>
<p><b>48-4-15 Contracts limiting or restraining adoptions.</b></p>	<p>Contracts which limit the right to petition for adoption or which attempt to alter the provisions of this chapter are void as against public policy</p>	<p>No change.</p>	<p>No change.</p>



48-4-16 Prohibition of purchase or sale of child; penalty; definitions; exceptions.	Criminalizes the purchase or sale of children as a felony; Creates exceptions for: reasonable and customary agency fees for services; reasonable and customary legal, medical, hospital or other expenses incurred in connection with legal adoption proceedings; surrogacy contracts; fees authorized by law or the court relating to the child's placement plan.	Adds a proviso that at the final hearing an affidavit of fees and expenses paid or promised by the adoptive parents shall be submitted to the court; and that the payments of pregnancy and living expenses of the birth mother shall be itemized and specifically approved by the court before they are expended.	Accepts the WVLI proviso with regard to affidavit of fees and expenses paid or promised to be submitted at the final hearing but deleted the proviso with regard to pre-approval of expenses. Replaces "in connection with legal adoption proceedings" with "in connection with the pregnancy, birth and adoption proceedings."
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### B. Current Adoption Procedure

An adoption proceeding is initiated by a petition that is to include all information known about the child's parentage and property.<sup>181</sup> If consents or relinquishments have been obtained, then they are attached to the petition.<sup>182</sup> If consents or relinquishments have not been obtained, then grounds for termination of parental rights are to be listed in the petition.<sup>183</sup> If the father is unknown, then, unless the birth mother is deceased, she must execute an affidavit detailing specific information with regard to her circumstances around the conception and birth of the child.<sup>184</sup> This affidavit is attached to the petition and is eventually sealed by the court.<sup>185</sup> The petition should also contain all of the child's available medical and social information, which is also eventually sealed in the court file.<sup>186</sup>

Despite the fact that putative fathers are included in the definition section,<sup>187</sup> they are given neither the right to consent<sup>188</sup> nor receive notice.<sup>189</sup> Those who must provide consent or otherwise have their rights terminated are: 1) all

<sup>181</sup> See W. VA. CODE § 48-4-7(a)(1)-(3), (g) (1999).

<sup>182</sup> See *id.* § 48-4-7(g).

<sup>183</sup> See *id.* § 48-4-7(a)(4).

<sup>184</sup> See *id.* § 48-4-7(b), (c).

<sup>185</sup> See *id.* § 48-4-7(b), (d).

<sup>186</sup> See W. VA. CODE § 48-4-7(f) (1999).

<sup>187</sup> See *id.* § 48-4-1(m) ("Putative father" means, before adoption, any man named by the mother as a possible biological father of the child pursuant to the provisions of section seven [§ 48-4-7] of this article, who is not a legal or determined father.).

<sup>188</sup> See *id.* § 48-4-3(a).

<sup>189</sup> See *id.* § 48-4-8(a).

mothers; 2) marital fathers; 3) outsider fathers who have been adjudicated as such or whose paternity actions are pending; 4) determined fathers.<sup>190</sup> In a step-parent adoption, the consent of the adoptive parent's spouse is not necessary, but it is required that s/he join in the adoptive parent's petition.<sup>191</sup> The "determined father" was defined more broadly to include not only those whose paternity was formally adjudicated or acknowledged by affidavit, but also those with an action for paternity establishment pending at the time that the adoption petition is filed.<sup>192</sup>

Consents may not be executed until seventy-two hours have passed after the birth of the child.<sup>193</sup> They must be signed and acknowledged before either a judge, someone designated by the court to take consents, a notary public, a commissioned military officer if the person signing the consent is in the military, or an officer of the foreign service if the person signing the consent is in another country.<sup>194</sup>

The consent or relinquishment must be in the signatory's primary language.<sup>195</sup> It must contain statutorily prescribed information about the child, the person signing the consent, and the lawyers or agencies involved in the adoption, as well as additional information attesting the signatory's understanding of the impact of the adoption, the availability of counseling, and the Voluntary Adoption Registry.<sup>196</sup> It may allow for conditional revocation<sup>197</sup> and, if it does, instructions must be provided as to how to revoke.<sup>198</sup> The person signing the consent or relinquishment must be provided with a copy.<sup>199</sup>

If consents cannot be obtained, then a hearing will be scheduled to terminate the parental rights of those who have not consented.<sup>200</sup> The most common theory upon which termination is pursued is abandonment.<sup>201</sup> The new statute uses the Institute's language with regard to both the general<sup>202</sup> and presumptive<sup>203</sup>

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<sup>190</sup> See *id.* § 48-4-3(a). However, it is important to note an inconsistency in the statute regarding who is required to consent. For further discussion of this inconsistency, see *infra* Part IV.A.

<sup>191</sup> See W. VA. CODE § 48-4-3(b)(3) (1999).

<sup>192</sup> See W. Va Code § 48-4-1 (h) (1999).

<sup>193</sup> See *id.* § 48-4-3a(a).

<sup>194</sup> See *id.* § 48-4-3a(b).

<sup>195</sup> See *id.* § 48-4-3b(a).

<sup>196</sup> See *id.*

<sup>197</sup> See W. VA. CODE § 48-4-3b(b) (1999).

<sup>198</sup> See *id.* § 48-4-3b(c)(3).

<sup>199</sup> See *id.* § 48-4-3b(a)(13)(i).

<sup>200</sup> See *id.* § 48-4-7(a)(4); see also *infra* Part IV.A.

<sup>201</sup> See *supra* Part I.A.

<sup>202</sup> See W. VA. CODE § 48-4-1(a) (1999).

<sup>203</sup> See *id.* § 48-4-3c.

definitions of abandonment. The Legislature added one subsection of its own. If the father is unknown,<sup>204</sup> he has presumptively abandoned his child if he "fails, prior to the entry of the final adoption order, to make reasonable efforts to discover that a pregnancy and birth have occurred as a result of his sexual intercourse with the birth mother."<sup>205</sup>

Since the statute's enactment, one case has been decided construing the abandonment provisions of the statute. In *In re Jeffries*,<sup>206</sup> the court applied the presumptive abandonment definition to find that a non-marital father had abandoned his child by failing to provide any financial support and by failing to visit with the child at any time during her life. The child was a year and a half old at the time of the hearing to terminate the non-marital father's parental rights.<sup>207</sup> The court did not credit the father's excuse that he did not know where the child was, given that he had been in contact with both the child's mother and the adoptive family's attorney for significant periods of time and never approached any of them about supporting or visiting the child.<sup>208</sup> The trial court's finding that the father had not abandoned his child because he sought blood tests and established paternity was reversed.<sup>209</sup> By the application of the presumption to the facts in this case, the supreme court was clear that more than just legalistic maneuvering is required to establish a protected parent-child relationship.

In addition to the question of consent, the adoption practitioner must be aware of the notice requirements in the adoption statute. Unless notice of the adoption has been waived, it must be served upon: 1) all those from whom consents are required; 2) any person with adjudicated custody or visitation rights; 3) the spouse of the petitioner if she or he has not joined in the petition; and 4) a grandparent of the child if that grandparent's child is a deceased parent of the child who had never executed a consent or relinquishment or otherwise had his or her rights terminated.<sup>210</sup> In addition, at any time during the proceedings, the court shall order notice served upon anyone who should have been served earlier, but was not, anyone who has revoked his or her consent, or any person who can provide relevant

<sup>204</sup> The confusion caused by including unknown fathers in this abandonment section while requiring only fathers who, by definition, would be known to provide consent is discussed further in Part III.B *infra*.

<sup>205</sup> W. VA. CODE § 48-4-3c(c) (1999).

<sup>206</sup> 512 S.E.2d 873 (W. Va. 1998).

<sup>207</sup> See *id.* at 877. Because the adoptive couple waited over a year after the child's placement to file their petition for adoption, the child's father had time to have his paternity adjudicated, thereby making him a determined father, entitled to be approached for consent under the statute. If the family had initiated and resolved the petition prior to the paternity action, they would not have needed his consent. The implications of this case for non-marital fathers will be discussed in greater detail in the forthcoming article in the *West Virginia Law Review's* Spring Symposium issue, *Family Law in the Year 2000*. See 102 W. VA. L. REV. (forthcoming Spring 2000).

<sup>208</sup> See *id.* at 880.

<sup>209</sup> See *id.* at 881.

<sup>210</sup> See W. VA. CODE § 48-4-8(a) (1999).

information to the court that the court chooses to hear.<sup>211</sup>

If the father is unknown, the court will inspect the birth mother's affidavit, determine whether additional evidence should be taken at a hearing, and finally determine whether the father can be identified.<sup>212</sup> This determination has to be made at least sixty days before the final hearing on the adoption petition.<sup>213</sup> If the father can be identified, then he should be served with notice.<sup>214</sup> If he cannot be identified, then the court must determine whether publication is likely to lead to receipt of notice by him.<sup>215</sup> If it is not, then the court may dispense with any further efforts at notice.<sup>216</sup>

The methods to be used for serving notice vary depending upon whether the person to be served is a resident or non-resident. Resident service is governed by Rule 4 of the West Virginia Rules of Civil Procedure.<sup>217</sup> For non-residents, a hierarchy of preferred methods of service governs, requiring that each method be tried, if possible, in descending order: 1) personal service; 2) registered or certified mail, return receipt requested, to the person's last known address, with instructions to forward; or 3) publication.<sup>218</sup> If the person to be served is under a disability, service must be made on him personally, as well as on his or her personal representative or a guardian ad litem.<sup>219</sup> Those served by publication have thirty days to respond.<sup>220</sup>

After the filing of the petition, a discreet inquiry will be conducted, unless the court waives this requirement.<sup>221</sup> Typically, the court appoints an individual to perform this inquiry shortly after the filing of the petition. The report must be ready for the final hearing and should include at a minimum: 1) a description of the adoptive family members, including their medical and employment histories; 2) a physical description of the home and surroundings; 3) a description of the adjustment of the child and family; 4) a report from the adoptive family's personal references; and 5) any other information the court deems necessary, which may include a criminal background investigation of the adoptive family.<sup>222</sup>

After all issues concerning parental rights have been resolved, and the

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<sup>211</sup> See W. VA. CODE § 48-4-8(b) (1999).

<sup>212</sup> See W. VA. CODE § 48-4-8b(a) (1999).

<sup>213</sup> See *id.*

<sup>214</sup> See W. VA. CODE § 48-4-8b(b) (1999).

<sup>215</sup> See W. VA. CODE § 48-4-8b(c) (1999).

<sup>216</sup> See W. VA. CODE § 48-4-8b(c) (1999).

<sup>217</sup> See W. VA. CODE § 48-4-8a(a) (1999).

<sup>218</sup> See W. VA. CODE § 48-4-8a(c) (1999).

<sup>219</sup> See W. VA. CODE § 48-4-8a(d) (1999).

<sup>220</sup> See W. VA. CODE § 48-4-8a(e) (1999).

<sup>221</sup> See W. VA. CODE § 48-4-9(b) (1999).

<sup>222</sup> See W. VA. CODE § 48-4-9(b)(1)-(5) (1999).

child has resided with the adoptive family for six months, the final hearing on the adoption may take place. At this hearing, the court will receive the report from the discreet inquiry and will consider evidence to determine whether the adoption is in the child's best interest. Other facts that must be determined at this hearing include whether the adoptive parents are fit to adopt the child, are of good moral character, are of respectable standing in the community, and are able to properly, maintain and care for the child.<sup>223</sup> Finally, at the hearing, an affidavit of fees and expenses paid or promised by the adoptive parents is also submitted to the court for its approval.<sup>224</sup>

If the court is satisfied that the adoption is in the child's best interest and that all of the requirements of the statute have been met, it will order the adoption. With this order, the records of the adoption will be sealed and the prior legal status of the birth parents extinguished, as the adoptive parents assume all of the rights and responsibilities of parenthood for the adopted child.<sup>225</sup> The order may not disclose the names or addresses of the birth parents.<sup>226</sup> The order is recorded, and new birth certificates are issued, by the bureau of vital statistics to show that the child was born to the adoptive parents.<sup>227</sup>

The adoption order is final for appeal purposes on the day that it is issued,<sup>228</sup> and all such appeals are to be heard expeditiously by the West Virginia Supreme Court of Appeals.<sup>229</sup> The order becomes final for all other purposes when the time for appeal has passed.<sup>230</sup> After the expiration of six months from the date that the adoption is final, no challenge may be brought to the adoption for any reason.<sup>231</sup> Challenges brought during the six-month period are subject to the clear and convincing evidence standard, and it must be shown that vacating the adoption would serve the best interest of the child.<sup>232</sup> These challenges may only be brought by persons who did not receive proper notice.<sup>233</sup> Although an adoption may not be set aside because of the adoptive parents' refusal to abide by an agreement for visitation or communication, a petition for enforcement of such agreements may be brought, and will be decided, using the best interest standard.<sup>234</sup>

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<sup>223</sup> See W. VA. CODE § 48-4-9(d) (1999).

<sup>224</sup> See W. VA. CODE § 48-4-16(f) (1999).

<sup>225</sup> See W. VA. CODE § 48-4-9(d) (1999).

<sup>226</sup> See *id.*

<sup>227</sup> See W. VA. CODE § 48-4-10(e) (1999).

<sup>228</sup> See W. VA. CODE. § 48-4-12(a) (1999).

<sup>229</sup> See W. VA. CODE § 48-4-12(f) (1999).

<sup>230</sup> See W. VA. CODE § 48-4-12(a) (1999).

<sup>231</sup> See W. VA. CODE § 48-4-12(b) (1999).

<sup>232</sup> See W. VA. CODE § 48-4-12(c) (1999).

<sup>233</sup> *Id.*

<sup>234</sup> See W. VA. CODE § 48-4-12(e) (1999).

#### IV. SURELY THIS CAN'T BE RIGHT: PROBLEMS RESULTING FROM DRAFTING IN THE NOTICE AND CONSENT PROVISIONS OF WEST VIRGINIA'S 1997 ADOPTION STATUTE

As the Legislature wrangled over the parts of the Institute proposal it was willing to accept and wrangled with each other to reconcile the differences between the two houses, it is clear that more time was needed on the eve of the session to reconcile the differences within the enrolled bill itself. In the end, the Legislature wound up bestowing greater rights upon unknown fathers than some categories of known non-marital fathers. The Legislature also created unnecessary redundancies in the notice and consent provisions that can only serve to confuse.

##### A. *Inconsistencies on the Critical Issue of Consent*

As has been pointed out throughout this article, the legislature rejected the Institute's proposal to include all birth parents in the consent provisions.<sup>235</sup> However, in the waning hours of the session that produced the statute, the legislature failed to edit a portion of the statute which assumes that *all* birth parents will need to provide consent or otherwise have their rights terminated.

Even though section 3 is explicit that the only nonmarital fathers who need to be approached for consent are determined and outsider fathers,<sup>236</sup> section 6 of the statute contradicts that legislative intent. Section 6 provides, in part, that the hearing on the petition may be had only after "all necessary consents or relinquishments have been executed and submitted or the rights of *all nonconsenting birth parents* have otherwise been terminated."<sup>237</sup> "Birth parents" are defined as "both the biological father and the biological mother of the child."<sup>238</sup> This provision, at the end of section 6, throws confusion into who must truly provide consent. Even though section 3 would exclude many nonmarital fathers from having to provide consent, section 6 won't allow the court to go forward unless all birth fathers have their rights terminated, and the sentence certainly implies that they should also be approached for consent before termination.

This contradiction undermines clarity on a critical issue and must be fixed. The constitutionality of either interpretation will be discussed at length in my next article.<sup>239</sup>

##### B. *Redundancies in the Notice and Consent Provisions*

Under the current adoption statute, only legal, determined, and some

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<sup>235</sup> See table *supra* Part III.A; discussion *supra* Parts II.C, III.B.

<sup>236</sup> See W. VA. CODE § 48-4-3(a) (1999).

<sup>237</sup> See W. VA. CODE § 48-4-6(b) (1999) (emphasis added).

<sup>238</sup> See W. VA. CODE § 48-4-1(f) (1999).

<sup>239</sup> See Kelly, *supra* note 13.

outsider fathers are required to provide consent.<sup>240</sup> A legal father is a man married to the child's mother at the time of conception or birth.<sup>241</sup> A legal father may also be a biological father who subsequently marries the mother prior to the adoption.<sup>242</sup> Determined fathers are those in whom paternity has been adjudicated, either formally or informally, as well as those who have paternity actions pending at the time that the adoption is filed.<sup>243</sup> Outsider fathers are those biological fathers of children born to, or conceived by, the mother while she is married to another man.<sup>244</sup> Only those outsider fathers whose rights have been adjudicated or whose cases are pending at the time of the adoption need be approached for consent.<sup>245</sup>

If a father does not fall into one of these three categories, the adoption may proceed without his consent and without terminating his rights.<sup>246</sup> Consent must be obtained from all mothers, regardless of their marital status at the time of the child's birth.<sup>247</sup>

The Legislature amended the general notice provision using the Institute proposal as a working document. However, the changes that it made to the Institute's proposal resulted in confusing redundancy. West Virginia Code section 48-4-8(a)(1) requires that notice be provided to anyone whose consent is required, unless they have waived that right to notice or otherwise have had their parental rights terminated.<sup>248</sup> As explained above, this provision would have required that legal, determined, and outsider fathers also receive notice unless they have waived that right or had their parental rights terminated. Subsection (a)(2) goes on to require that the following group of fathers also receive notice: "[a]ny person whom the petitioner knows is claiming to be the father of the child *and* whose paternity of the child has been established pursuant to the provisions of article six [section 48A-6-1 et seq.] chapter forty-eight-a of this code."<sup>249</sup> (emphasis added). This section

<sup>240</sup> See W. VA. CODE § 48-4-3(a) (1999).

<sup>241</sup> See W. VA. CODE § 48-4-1(i) (1999).

<sup>242</sup> See *id.*

<sup>243</sup> See W. VA. CODE § 48-4-1(h) (1999).

<sup>244</sup> See W. VA. CODE § 48-4-1(f) (1999).

<sup>245</sup> See W. VA. CODE § 48-4-3(a)(2) (1999).

<sup>246</sup> In the Institute's Proposal, the following fathers were required to give their consent: 1) legal fathers; 2) determined fathers; 3) outsider fathers whose rights had been adjudicated or whose cases were pending at the time of the adoption; and 4) putative fathers. WVLI PROPOSAL, *supra* note 65 § 48-4-3(a). [Putative father] was defined as the man or men named by the mother as the possible biological father of the child in the affidavit of the birth mother attached to the petition. WVLI PROPOSAL, *supra* note 65 § 48-4-1(c). This definition of putative father was adopted by the Legislature at W. VA. CODE § 48-4-1(m) (1999).

<sup>247</sup> See W. VA. CODE § 48-4-3(a)(1) and (3) (1999). The constitutionality of the ultimate notice and consent provisions adopted by the Legislature will be considered in the author's article to be published in the *West Virginia Law Review* Spring Symposium issue, *Family Law in the Year 2000*. See 102 W. VA. L. REV. (forthcoming Spring 2000).

<sup>248</sup> See W. VA. CODE § 48-4-8(a)(1) (1999).

<sup>249</sup> W. VA. CODE § 48-4-8a(2) (1999).

makes little sense. Any person whose paternity has been adjudicated pursuant to the referenced article would be considered a determined father and would therefore be entitled to notice under subsection (a)(1). This right to notice would exist without regard to whether the petitioner knew of the determined father's claims of paternity.

From this reporter's vantage point, it is easy to see how the Legislature came to this confusing and unnecessary subsection. In the Institute's proposal, the Institute required that notice be provided to those from whom consent was required, using the same language as was ultimately reflected in the enrolled bill's subsection (a)(1). However, under the Institute's proposal governing consent, this subsection would have meant that putative fathers also would be included in the group of fathers required to give consent and receive notice.<sup>250</sup> Putative fathers referred to those fathers named by the mother, who were neither legal nor determined fathers.<sup>251</sup>

The Institute's proposed subsection(a)(2) required that the following set of fathers also receive notice:

An individual whom the petitioner knows is claiming to be the father of the minor adoptee and whose paternity has not been established under Article 6 of this chapter, but notice need not be served upon a man who has executed a verified statement, as described in section 48-4-3c;<sup>252</sup>

The Institute believed that, with this subsection, it was being especially careful to notice all possible fathers, even those whom the mother failed to name as putative fathers, but whom the petitioner, for any reason, knew to be claiming paternity. However, if these fathers had at any time denounced paternity in a written statement, then they need not receive notice.

In the final drafting of this Act, it appears that the Legislature kept the first half of the Institute's proposed language in subsection(a)(2), but ultimately changed the second half requires formally establishing paternity establishment. The Legislature was working off the Institute proposal but by editing it in this manner it created a redundant provision.

The only other way that fathers, other than those legal, determined, or outsider fathers, could receive notice, would be if at the time of the adoption, the father had physical custody of the child. This method of entitlement to notice can be discerned from subsection (a)(3), which allows for "[a]ny person other than the petitioner who has legal or physical custody of the child or who has visitation rights with the child under an existing court order issued by a court in this or another state" may receive notice. Therefore, the only way that a putative father, i.e., a father who is neither the legal nor determined father, would fall into this general

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<sup>250</sup> WVLI PROPOSAL, *supra* note 65 § 48-4-8(a)(2), (Alternative draft 11/18/96).

<sup>251</sup> WVLI PROPOSAL, *supra* note 65 § 48-4-1(c).

<sup>252</sup> *See id.* § 48-4-1(c).



category of individuals would be if he somehow came to have physical, as opposed to legal, custody of the child. Any adjudicated custody or visitation rights would have arisen as result of an adjudication of paternity, which would mean that he was the determined father and entitled to notice and consent under subsection(a)(1) in any event.

C. *Elevating the Unknown Father's Rights over Those of Other Non-Marital Fathers*

If the above was all that the Legislature had enacted with regard to non-marital fathers, then, apart from some internal redundancies, the statute would provide consistent and clear rules with regard to notice and consent. Those rules could be distilled as follows: 1) only those non-marital fathers whose rights have been or, in the case of "outsider fathers," are in the process of being adjudicated are entitled to veto power in adoption; and 2) only one additional group of fathers is entitled to notice, i.e., those non-marital fathers who have assumed responsibility for the child through having physical custody of him or her at the time of the adoption.

However, the general notice provision was not the only provision enacted by the Legislature. The Legislature also addressed the problem of the unknown father. As described in detail in Part II above, the statute requires the birth mother who claims that the father is unknown to submit an affidavit to the court, in which she answers specific questions in the hopes of unearthing the identity of the unknown father.<sup>253</sup> This affidavit makes sense in the context of the Institute's proposal, in which a broader group of fathers were included in the notice and consent provisions.

However, in the context of the Legislature's ultimate statute, the affidavit would be far more to the point, and less intrusive into the mother's privacy, if she were simply asked to reveal information that would go to the existence of legal,<sup>254</sup> determined<sup>255</sup> and outsider fathers,<sup>256</sup> as well as any men who might have had physical custody of the child prior to the adoption proceeding.<sup>257</sup>

As it is now, the birth mother is asked information that has nothing to do with identifying these categories of fathers. Instead, she is asked personal information, irrelevant to those entitled to notice and consent under the statute as enacted. For example, she is required to disclose whether she has informed any

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<sup>253</sup> See W. VA. CODE § 48-4-7(b) (1999).

<sup>254</sup> This information is required to be included in the affidavit under W. VA. CODE § 48-4-7(b)(1) (1999).

<sup>255</sup> This information is required to be included in the affidavit under W. VA. CODE § 48-4-7(b)(7) (1999).

<sup>256</sup> Information relevant to this inquiry also would be included in the affidavit under W. VA. CODE § 48-4-7(b)(7) (1999).

<sup>257</sup> There is nothing in the existing affidavit requirements which speak to facts relevant to this inquiry. See W. VA. CODE § 48-4-7(b) (1999).

hospital personnel of the identity of the father,<sup>258</sup> whether she has named any man as father on the birth certificate,<sup>259</sup> and whether she was cohabiting with any man at the probable time of conception.<sup>260</sup> All of these facts, while useful in determining the identities of putative fathers, have little to do with discovering the identities of those who are entitled to notice and consent under the current statute. Not only is this affidavit unnecessarily intrusive into the lives of birth mothers, but it also invades the privacy of the men whose names she must disclose in response to these inquiries.

However, because the Legislature did adopt the Institute's complete proposal with regard to unknown fathers, it turns out that unknown fathers, once identified, are entitled to notice.<sup>261</sup> While this end may at least justify asking all of the questions of the birth mother discussed above, it also produces an anomalous result. For example, if the unknown father turns out to be a mere putative father, i.e. one who is neither a legal, determined or adjudicated outsider father, he now is entitled to notice.

To consider a more specific example, assume that the birth mother conceived the child while living with a man who was abusive. Once she becomes pregnant, he becomes even more abusive. She determines that she will have to leave him in order to preserve her own safety, as well as the safety of the child she is carrying. Two years after the child is born, she marries another man. In two more years, she joins her husband in petitioning for the child's adoption. The biological father has never supported the child or visited the child. The birth mother initially lists the child's father as unknown, but during the process of completing the "unknown father" affidavit, she discloses the name of this man with whom she cohabited. She is unable to offer a truthful explanation for why she contends he is not the father. He now is entitled to notice, even though he has never been adjudicated the child's father.

By contrast, assume that the birth mother lived peacefully with the child's father during her pregnancy. During the pregnancy, the couple decide that they are incompatible and that marriage for the sake of the child would be a mistake. After the child's birth, the father moves out, but he continues to support the child financially and visits frequently as well. Neither the mother nor the father ever brought a paternity action because both were happy with the level of support, both financial and emotional, that the father was able to provide. Eventually, the child's mother marries, and the new couple, anxious to form a family unit, files a step-parent petition for adoption. The mother does not list the father as unknown. She accurately states the facts known about the child's parentage. The child's father in this case has no right to notice.

What is the operating principle that could justify the differences in

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<sup>258</sup> See W. VA. CODE § 48-4-7(b)(5) (1999).

<sup>259</sup> See W. VA. CODE § 48-4-7(b)(4) (1999).

<sup>260</sup> See W. VA. CODE § 48-4-7(b)(2) (1999).

<sup>261</sup> See W. VA. CODE §§ 48-4-8b(b) (1998).

treatment in these two hypothetical situations? The father in the first receives notice because he evolved from an unknown putative father, into a known putative father. The father in the second receives no notice because the mother was more willing to be honest. While there may be a few justifications that could be offered here,<sup>262</sup> the truth is most likely that the Legislature adopted portions of the Institute proposal, rejected others, and modified still more in a manner that lost sight of the need for a coherent approach to the notice and consent question. If the Legislature chooses to revisit the notice and consent provisions, a more complete consideration ought to be given to integrating all of the various aspects of the statute with one another to produce a more coherent approach to notice and consent.

This author's article to follow will explore more fully the constitutional ramifications of the choices that the Legislature made with regard to the notice and consent provisions of the statute. However, even without the constitutional questions that may be implicated by the Legislature's approach, it is clear that additional thought should be given to the treatment of the unknown father.

## V. CONCLUSION

In the end, West Virginia did achieve the finality that it sought in adoptions. However, the West Virginia Law Institute's goals of providing greater protection to more categories of birth parents at the beginning of the process was not accomplished. In the next installment of this close look at West Virginia adoption law, the statute will be scrutinized further under the United States and West Virginia constitutions.

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One justification, unsatisfactory to this author, is that the provision is intended to be punitive, i.e., that when birth mothers hide the facts and their dishonesty is revealed, they should be forced to realize the outcome they feared. Another closely related rationale might be to force greater counseling with birth mothers before they declare a known father to be unknown. Perhaps if the birth mother in the first example had been made aware of the consequences of being forthright as opposed to concealing the father's identity, she would have disclosed his identity from the start. This would serve the purpose of ensuring that fewer fathers are listed as unknown, thereby helping adoptive parents to rest more comfortably when the final adoption decree is entered.